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No. _____ OFFICE OF THE CLERK

In The
Supreme Court of the United States

C. THOMAS ROSS,

Petitioner,

v.

JOHN C. WHITAKER, JR., ELIZABETH N. WHITAKER, II, and WILLIAM A. WHITAKER,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of North Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Rule 34 of the North Carolina Rules of Appellate Procedure violates the due process clause of the Fourteenth Amendment of the Constitution of the United States by permitting a North Carolina appellate court to sanction an attorney without providing notice and an opportunity to be heard.

PARTIES TO THE PROCEEDING

Petitioner is C. Thomas Ross, an attorney duly admitted to practice in the State of North Carolina and to the Bar of this Court, and former counsel for Plaintiff-below, Louisa B. Whitaker. Respondents are John C. Whitaker, Jr., Elizabeth N. Whitaker, II, and William A. Whitaker.

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Whitaker v. Whitaker, No. COA07-1497, North Carolina Court of Appeals' Order of 6 February 2008 (allowing Appellees' Motion to Dismiss) (App. 5a-6a).

Whitaker v. Whitaker, No. 02 CVS 1327, General Court of Justice, Superior Court Division, Forsyth County: Order of June 27, 2007, (awarding fees in favor of Defendants and against Petitioner and Plaintiff) (App. 7a-10a).

Whitaker v. Whitaker, 181 N.C. App. 609, 640 S.E.2d 446 (2007) (decision sanctioning Petitioner and Plaintiff and remanding the case to the trial court for a determination of reasonable attorneys' fees) (App. 11a-37a).

In re Whitaker, 179 N.C. App. 375, 633 S.E.2d 849 (2006) (App. 38a-50a).

Whitaker v. Whitaker, 169 N.C. App. 256, 611 S.E.2d 899 (2005) (51a-59a).

STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

Petitioner is seeking review of the April 10, 2008, order of the Supreme Court of North Carolina in which that court granted Respondents' Motion to Dismiss and denied Petitioner's Petition for Discretionary Review. Jurisdiction in this Court is based on 28 U.S.C. § 1257, since Petitioner seeks the issuance of a writ of certiorari for review of a final judgment rendered by the highest court of the State of North Carolina. In promulgating Rule 34 of the North Carolina Rules of Appellate Procedure, the Supreme Court of North Carolina provided for a procedure in which an attorney could face sanctions without first being provided notice and an opportunity to be heard. Petitioner's due process rights, guaranteed by the Fourteenth Amendment of the Constitution, were violated when the Court of Appeals of North Carolina sanctioned Petitioner without first providing him with notice of the potential sanction and an opportunity to be heard.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

The Fourteenth Amendment to the Constitutions, which provides as follows:

Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection

SECTION .1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION.2. Representatives shall be apportioned among the several States according to their respective c numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vise President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the member of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION.3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or

judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may be a vote of two-thirds of each House, remove such disability.

SECTION.4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrections of rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims be held illegal and void.

SECTION.5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

And, Rule 34 of the North Carolina Rules of Appellate Procedure, which provides as follows:

Rule 34. Frivolous appeals; Sanctions.

(a) A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that an appeal or any proceeding in an appeal was frivolous because of one or more of the following:

(1) the appeal was not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(3) a petition, motion, brief, record, or other paper filed in the appeal was so grossly lacking in the requirements of propriety, grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court.

(b) A court of the appellate division may impose one or more of the following sanctions:

(1) dismissal of the appeal;

(2) monetary damages including, but not limited to,

a. single or double costs,

b. damages occasioned by delay,

c. reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding;

(3) any other sanction deemed just and proper.

(c) A court of the appellate division may remand the case to the trial division for a hearing to determine one or more of the sanctions under (b)(2) or (b)(3) of this rule.

(d) If a court of the appellate division remands the case to the trial division for a hearing to determine a sanction under (c) of this rule, the person subject to sanction shall be entitled to be heard on that determination in the trial division.

(Adopted June 13, 1975; Amended December 8, 1988 — effective July 1, 1989; Amended April 14, 1999 — 34(d).)

STATEMENT OF THE CASE

The Petitioner, C. Thomas Ross, and Plaintiff-below, Louisa B. Whitaker, were jointly assessed attorneys' fees in the amount of $15,992.50 by the Order of June 27, 2007, of the Superior Court of Forsyth County, the Honorable Judge Ronald E. Spivey presiding. (App. 7a-10a). This Order issued following the mandate of the Court of Appeals of North Carolina from a prior appeal in this proceeding where the Court of Appeals, without providing Petitioner with notice or an opportunity to be heard, held that Respondents were entitled to their reasonable apttorneys' fees and remanded the case to the trial court solely for the imposition of fees against Plaintiff and her [now former] counsel. *Whitaker v. Whitaker*, 181 N.C. App. 609, 640 S.E.2d 446 (2007) (hereafter, "*Whitaker III*") (App. 34a-37a). At the hearing of June 25, 2007, Petitioner raised an objection to the imposition of sanctions, since the Court of Appeals did not provide Petitioner with the due process required by the Constitution. (App. 8a). Petitioner also raised this federal question when he appealed the order to both the Court of Appeals and the Supreme Court of North Carolina. On July 23, 2007, Petitioner filed his notice

of appeal with the Court of Appeals of North Carolina. Respondents filed a Motion to Dismissal Appeal. On February 6, 2008, the Court of Appeals issued an order granting Respondents' Motion to Dismiss Appeal. (App. 5a-6a). On February 21, 2008, Petitioner filed a Notice of Appeal and a Petition for Discretionary Review with the Supreme Court of North Carolina. Respondents filed a Motion to Dismiss Appeal and Response to the Petition for Discretionary Review. On April 10 2008, the Supreme Court of North Carolina issued an order granting Appellees' Motion to Dismiss Appeal and denying Petitioner's Petition for Discretionary Review. (App. 1a-2a).

The underlying dispute in this case concerns a disagreement amongst siblings over real property inherited from their mother. (App. 12a-20a). During the trial of the underlying matter, the parties reached a settlement agreement, which was reduced to a judgment that was read into the court record. (App. 43a-44a). It is notable that Petitioner Ross did not represent Ms. Whitaker during the trial of the underlying matter and the initial appeal; his representation began during the matter that was the subject of the *In re Whitaker* case, provided in the Appendix pp. 38a-50a. There were subsequent disputes concerning the interpretation of the judgment and on September 23, 2005, a hearing was held on Plaintiff's Motion to Construe the Settlement Agreement and Respondents' Motion to Compel Plaintiff to Comply with Judgment, to Hold Plaintiff in Contempt, and for Sanctions. (App. 15a-16a). The crux of the dispute, as detailed in the *Whitaker III* opinion, surrounded the parties' use of the term "fixtures" in the settlement agreement. App. (28a-

32a). Typically a fixture is "personal property that has been attached to land or a building and that is regarded as an irremovable part of the real property." Black's Law Dictionary 261 (Pocket Ed. 1996). In this case, the settlement agreement permitted Plaintiff to remove certain fixtures that were located on her mother's property. (App. 15a). On October 4, 2005, the trial court issued an order determining what items were not fixtures and indicating that the court was unable to decide whether certain items were fixtures without an evidentiary hearing. (App. 17a). In the Order of October 4, 2005, the court further set the closing date on the real estate transaction for October 31, 2005. Plaintiff filed a Notice of Appeal of this order. (App. 17a). On December 16, 2005, Plaintiff filed a Motion to Conduct an Evidentiary Hearing as to what were and were not removable fixtures. (App. 19a). On January 9, 2006, Respondents filed a Motion for Order to Show Cause and Notice of Hearing. At the show cause hearing, the trial court issued an order finding Plaintiff to be in willful contempt of the trial court's order of October 4, 2005, and Plaintiff filed a Notice of Appeal concerning the contempt order issued January 27, 2006. This appeal was consolidated with the appeal of the Order of October 4, 2005, and the matter was heard in the Court of Appeals of North Carolina on October 19, 2006; this appeal resulted in the *Whitaker III* decision, filed February 6, 2007. (App. 19a-20a).

In *Whitaker III*, the Court of Appeals determined that Plaintiff's appeal violated Rule 34(a) of the North Carolina Rules of Appellate Procedure (hereafter N.C.R.App.P. 34(a)) and held, sua sponte, that Respondents were entitled to their reasonable

attorneys' fees, with the award to be imposed jointly against Plaintiff and her counsel (Petitioner here). (App. 34a-37a). At no time did the Court of Appeals notify Petitioner that it was considering assessing a sanction against him and the Court of Appeals never provided Petitioner with an opportunity to show cause why he should not be assessed a sanction. The Court of Appeals remanded the matter to the trial court for a determination of reasonable attorneys' fees. (App. 37a). After the *Whitaker III* opinion, Plaintiff, Louisa B. Whitaker, retained new counsel and, on March 8, 2007, filed a Petition for Discretionary Review with the Supreme Court of North Carolina. Petitioner Ross took no part in Ms. Whitaker's Petition with the Supreme Court of North Carolina; any such effort would have been premature, since Petitioner Ross did not have a justiciable claim until the trial court determined the amount of the attorneys' fees and entered an order assessing the fees against Petitioner Ross. On May 3, 2007, the Supreme Court of North Carolina summarily denied Ms. Whitaker's petition. Both Ms. Whitaker and Mr. Ross were assessed with attorneys' fees as a result of the aforementioned order of the trial court, issued June 17, 2007, after a hearing on the issue of the amount of attorneys' fees to be awarded. (App. 7a-10a).

As set forth *supra*, Petitioner has exhausted his appellate remedies in North Carolina—neither the Court of Appeals nor the Supreme Court of North Carolina has provided him with an opportunity to vindicate his rights. Petitioner is seeking review of the actions of the North Carolina appellate courts and the constitutional deficiencies of N.C.R.App.P. 34(a), both on its face and as applied to the facts of this case.

REASONS FOR GRANTING THE PETITION

The Court should grant this Petition because N.C.R.App.P. 34, both as applied in the case *sub judice* and on its face, violates the Fourteenth Amendment of the Constitution of the United States by depriving an individual of notice of a potential sanction and an opportunity to be heard. The mandate of the Court of Appeals in *Whitaker III* sanctioned Petitioner without providing him notice that it was contemplating sanctions and did not provide Petitioner with the opportunity to show cause why sanctions should not be assessed. (App. 37a). The mandate did not give the trial court discretion as to the issue of liability—the sole issue for the trial court was the determination of the amount of sanctions. This would be analogous to a criminal court bypassing a trial on the merits of the charges against a defendant, summarily finding defendant guilty, and proceeding to give the defendant an opportunity to be heard on the limited issue of sentencing. Thus, *Whitaker III* resulted in the deprivation of Petitioner's due process rights.

I. Due process is required by the Fourteenth Amendment

Due process is a bedrock principle in the history of the United States. The guarantee of due process is embodied in the Fifth and Fourteenth Amendments to the Constitution and has been consistently protected in numerous cases in this Court and in other courts around the nation. What is required to ensure that an individual receives the process that is due was set forth by this Court in *Boddie v. Connecticut*, 401 U.S.

371, 91 S. Ct. 780 (1971). As Justice Harlan stated for the Court:

> Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits...What the Constitution does require is "an opportunity...granted at a meaningful time and in a meaningful manner," Armstrong v. Manzo, 380 U.S. 545, 552 (1965), "for [a] hearing appropriate to the nature of the case," Mullane v. Central Hanover Tr. Co., [339 U.S. 306, 313 (1950)]. The formality and procedural requisites for the hearing can vary, depending on the importance of the interest involved and the nature of the subsequent proceedings...In short, "within the limits of practicability," id., at 318, a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill its promise of the Due Process Clause.

Boddie, 401 U.S. at 379.

The due process that the *Boddie* Court required in the context of individuals who are seeking a divorce is equally applicable to attorneys who face a potential sanction—"It is well settled that, prior to disbarment or imposition of monetary sanctions, an attorney must be afforded procedural due process protections of notice and an opportunity to be heard." *United States v. Cooper*, 675 F. Supp. 753, 757 (D.R.I. 1987). To support this proposition, the district court in *Cooper* cites seven cases, which deal with every imaginable sanction an attorney could face, from disbarment (*Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 18 L. Ed. 366

(1866)), to "imposition of a monetary sanction," (*E.g., Roadway Express v. Piper*, 447 U.S. 752, 65 L. Ed.2d 488, 100 S. Ct. 2455 (1980) and *Miranda v. Southern Pacific Transportation Co.*, 710 F.2d 516 (9th Cir. 1983)). *Cooper*, 675 F. Supp. at 757. In *Roadway Express, Inc. v. Piper*, this court considered whether a sanction of fees under 28 U.S.C. § 1927 was proper. In discussing whether a court could sanction counsel, this Court stated, "If a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes...Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity to be heard." *Roadway Express, Inc. v. Piper,* 447 U.S. at 766-767 (citation omitted). In *Miranda v Southern Pacific Transportation Co.*, 710 F.2d 516 (9th Cir. 1983), the Ninth Circuit considered the propriety of a district court order in which the court imposed sanctions on opposing counsel for, "failing to comply with the local rules regarding the pretrial conference." *Miranda v. Southern Pacific Transportation Co.*, 710 F.2d at 518. After first deciding that a "district court ha[s] the authority to impose a sanction," the court turned to consideration of the procedure the court used when imposing the sanction. The Ninth Circuit stated that, "The attorneys also argue that the summary nature of the sanction was improper because they were denied notice, an opportunity to respond, and a hearing. We agree that sanctions should not be imposed without theses procedural protections." *Miranda v. Southern Pacific Transportation Co.*, 710 F.2d at 522. In addition to citing *Boddie* and *Roadway Express, Inc.*, the court stated that there were "several compelling reasons why notice, an opportunity to prepare a

defense, and a hearing are required before sanctioning counsel," including:

> ensuring that (1) the attorneys will have an opportunity to prepare a defense and explain their questionable conduct at a hearing; (2) the judge will have time to consider the severity and propriety of the proposed sanction in light of the attorneys' explanation for their conduct; and (3) the facts supporting the sanction will appear in the record, facilitating appellate review.

Miranda v. Southern Pacific Transportation Co., 710 F.2d at 522-523.

In the case presently before this Court, Petitioner was denied the notice and opportunity to be heard required by *Boddie*, *Roadway Express, Inc.*, and *Miranda v. Southern Pacific Transportation Co.*

Although a full trial on the issues need not occur to ensure that an attorney facing the prospect of sanctions receives due process, an appellate court must provide notice that the court is contemplating sanctioning the attorney and provide the attorney with the opportunity to explain the conduct at issue. Guidance for the proper procedure for ensuring due process when considering whether to sanction an attorney at the appellate level is found in *Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987), a case in which the Tenth Circuit addressed what process is due to an attorney who brought an appeal that was deemed, "patently frivolous, multiplicious and vexatious." *Id.* at 1504. In *Braley*, the Tenth Circuit

analyzed the procedure required under Fed. R. App. P. 38, the federal equivalent to N.C.R.App.P. 34, and determined that the attorney in that case did not get sufficient notice and an opportunity to be heard. Although the Tenth Circuit acknowledged that, "In one sense notice may seem superfluous when an appellate court has determined, after considering the briefs, argument and the record that the appeal is so unmeritorious as to be frivolous," the Tenth Circuit went on to state:

> But the determination to impose sanctions on an attorney for bringing a frivolous appeal involves another step—placing the blame. And there remains for consideration the defenses which might absolve the lawyer of the responsibility for taking the frivolous appeal. *This, we hold, justifies and requires notice and an opportunity to be heard before final judgment.* At this point the court has two options: to decide the matter itself or to remand to allow the district court to resolve the *entire* issue. An argument in favor of remand is that a hearing generally will be necessary to determine the amount of the costs to be paid, and trial courts are better equipped for hearing conflicting evidence. But usually the appellate court that made the frivolousness determination will want to hear for itself the excuses, if any, offered by the lawyer to avoid or to mitigate the sanctions. In such a case, if a party has already made a motion or request in its brief that sanctions be imposed...the notice requirements are satisfied, so long as the court gives the person against whom sanctions are requested

> an opportunity to file a brief or otherwise be heard before imposing sanctions. *On those occasions when the court intends to consider such sanctions sua sponte, due process is satisfied by issuance of an order to show cause why a sanction should not be imposed and by providing a reasonable opportunity for filing a response.*

Braley, 823 F.2d at 1514-1515 (citations omitted, emphasis added).

The Court of Appeals of North Carolina did not protect Petitioner's due process rights because it did not adopt a procedure like that provided for in *Braley*. Unlike the *Braley* court, the North Carolina Court of Appeals did not provide Petitioner with notice and an opportunity to be heard. Instead of remanding the *entire* issue of sanctions to the trial court, the Court of Appeals summarily found Petitioner liable for sanctions and only remanded the issue of the *amount* of sanctions. Although remanding the matter to the trial court did provide a hearing, Petitioner did not have an opportunity to show cause why sanctions should not issue and the trial court was only free to decide the issue of the amount of sanctions, not whether sanctions were appropriate and should be levied—the trial judge would have violated his oath of office by ignoring the Court of Appeals' mandate to sanction Petitioner.

The Third Circuit has likewise determined that notice and an opportunity to be heard are prerequisites to issuing sanctions against attorneys. In *Eash v. Riggins Trucking*, 757 F.2d 557 (3rd Cir. 1985), the

court considered "whether a district court may order an attorney to pay to the government the cost of impaneling a jury for one day as a sanction for the attorney's abuse of the judicial process." *Id.* In *Eash*, the district court taxed this cost sua sponte and without providing the attorney with notice. Noting this Court's mention of due process in *Roadway Express, Inc. v. Piper* and the language of Fed. R. App. Pro. 46(c) (requiring appellate courts to provide "reasonable notice and an opportunity show cause" before sanctioning an attorney), the Third Circuit states, "We believe that as a general practice a monetary detriment should not be imposed by a court without prior notice and some occasion to respond." *Eash*, 757 F.2d at 570. Again, Petitioner Ross did not receive notice that the Court of Appeals of North Carolina was contemplating assessing him with attorneys' fees and the Court of Appeals failed to provide Petitioner with an opportunity to respond prior to sanctioning him.

II. N.C.R.App.P. 34 is an anomaly in North Carolina law

In its present form, N.C.R.App.P. 34 violates the due process protections provided for in the Constitution and, in the case *sub judice*, the North Carolina Court of Appeals violated Petitioner's due process rights by the manner in which it used N.C.R.App.P. 34. The present version of N.C.R.App.34 was adopted by an order of the Supreme Court of North Carolina on April 8, 1999. The amendment affected Rule 34(d) by removing the provision, "If a court of the appellate division deems a sanction appropriate under this rule, the Court shall order the

person subject to sanction to show cause in writing or in oral argument or both why sanctions should not be imposed," and adopting the current language. (App. 60a-61a). This amendment opened the door for appellate courts to abridge the substantive rights of those who are subject to potential sanctions under Rule 34. In its present form, Rule 34 represents an anomaly regarding the process that is due to a person subject to sanctions under other North Carolina statutes or rule and is contrary to the precedent of this Court concerning the procedures required to ensure that due process is protected.

It is instructive to review the process afforded to individuals in North Carolina who face potential sanctions under the General Statutes concerning contempt and other rules of procedure dealing with sanctions. Under North Carolina law, when a judge chooses to proceed against a person for indirect criminal contempt, he/she must first issue an order directing the person to show cause why he should not be held in contempt of court. N.C.G.S. §§ 5A-13 and 5A-15. If the judge is punishing an individual for direct criminal contempt, the judge may issue punishment summarily or defer adjudication and sentencing. N.C.G.S. § 5A-13. However, under N.C.G.S. § 5A-14, even a judge who proceeds summarily on a charge of direct contempt must provide notice of the charges and a summary opportunity to respond. If the judge defers adjudication and sentencing, the procedure that applies is the same as if the matter concerned an indirect criminal contempt. Pursuant to N.C.G.S. § 5A-23, one who faces the prospect of being found in civil contempt must be notified and provided with an

opportunity to show cause why he should not be held in contempt. Thus, the North Carolina General Statutes concerning contempt provide the individual facing the contempt order with both notice and an opportunity to respond to the charge.

Pursuant to the North Carolina Rules of Civil Procedure, trial courts have the discretion to order sanctions in certain circumstances. N.C.R.Civ.P. 11 provides for the imposition of, "an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee," for pleading, motions, or other papers signed in violation of Rule 11. Although, on its face, the rule does not provide for notice and an opportunity to show cause why sanctions should not be issued, in practice, trial courts will either verbally notify the offending party of the possibility of Rule 11 sanctions and give the party an opportunity to respond or provide a separate hearing on the possible Rule 11 sanctions. *See Dunn v. Canoy*, 180 N.C. App. 30, 636 S.E.2d 243 (2006) and *Mack v. Moore*, 107 N.C. App. 87, 418 S.E.2d 685 (1992). N.C.R.Civ.P. 37 provides that a trial court may award reasonable expenses, including attorney's fees, on a motion for order compelling discovery. Before awarding fees to the prevailing party, the parties are afforded an opportunity for hearing. Thus, the rules governing the issuing of sanctions, including attorney's fees, at the trial court level provide notice and an opportunity to be heard as required by the Constitution. Unfortunately North Carolina law does not afford its counsel who practice in the appellate courts with the

same due process provided to other individuals who face sanctions. Petitioner is not seeking special treatment, but is seeking the same due process guaranteed by the Constitution and provided to other people in North Carolina.

Further support for the proposition that N.C.R.App.P. 34 violates the right to due process on its face is found by review of the federal rules concerning damages and costs for frivolous appeals. Fed. R. App. P. 38 contains provisions for notice and a reasonable opportunity to respond, which portions were part of 1994 amendments to the rule. The notes of the advisory committee on rules are particularly instructive:

> The amendment requires that before a court of appeals may impose sanctions, the person to be sanctioned must have notice and an opportunity to respond. The amendment reflects the basic principle enunciated in the Supreme Court's opinion in Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980), that notice and opportunity to respond must precede the imposition of sanctions. A separately filed motion requesting sanctions constitutes notice. A statement inserted in a party's brief that the party moves for sanctions is not sufficient notice. Requests in briefs for sanctions have become so commonplace that it is unrealistic to expect careful responses to such requests without any indication that the court is actually contemplating such measures. Only a motion, the purposes of which is to request sanctions, is sufficient. If there is no such motion filed,

> notice must come from the court. The form of notice from the court and of the opportunity for comment purposely are left to the court's discretion.

Fed. R. App. P. 38 advisory committee's notes.

The principle to which the Advisory Committee referred was clearly stated by this Court when it said, "Attorneys' fees *certainly* should not be assessed lightly *or without fair notice and an opportunity for a hearing on the record.*" *Roadway Express, Inc. v. Piper*, 447 U.S. at 767 (emphasis added). Furthermore, the Fourth Circuit, in its Local Rule 30(a), provides for attorney sanctions for unnecessary appendix designations, but only after providing an attorney with "reasonable notice and an opportunity to respond before the imposition of any sanction." 4th Cir.R. 30(a). It is striking that N.C.R.App.P. 34 does not provide the due process protections that are required by this Court and incorporated into the Federal Rules and Local Rule 30(a) of the Fourth Circuit.

III. The states are split in providing rules that explicitly protect the due process rights of appellate parties and counsel

There is a notable absence of uniformity in how the state courts approach the imposition of sanctions for violations of appellate rules. Forty states and the District of Columbia have a rule of appellate procedure that specifically addresses the issue of sanctions levied

as a result of appellate practice.[1] Twenty-four states, including North Carolina, have promulgated rules of procedure which provide for the issuance of an order for sanctions without guaranteeing notice or an opportunity to be heard (Washington is included in this category, as its rule permits the party to whom sanctions have been imposed to file a written objection to the order of sanctions, but only *after* the imposition of sanctions).[2] Conversely, fifteen states and the District of Columbia have rules regarding appellate sanctions that specifically provide for notice and an opportunity to be heard, by either written response or a hearing.[3] In addition to those sixteen jurisdictions, Colorado's rule governing sanctions at the appellate level is silent as to the issue of notice or an opportunity to be heard, but the rule does contain an annotation that states, "When an appellate court imposes sanctions upon an appellant, due process requires that

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[1] Ten states (Iowa, Louisiana, Nebraska, Rhode Island, South Dakota, Virginia, West Virginia, Wisconsin, and Wyoming) have no rules directly on-point, although sanctions may be available via the court's inherent authority or rules of professional conduct.

[2] In addition to North Carolina and Washington, the following states have promulgated rules that permit the imposition of sanctions without expressly providing due process protections: Alabama, Alaska, Arizona, Idaho, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, and Pennsylvania.

[3] These states include: Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Kansas, New York, Oregon, South Carolina, Texas, Utah, and Vermont.

the appellant be afforded certain protection before being deprived of his property. He is entitled to notice and an opportunity to respond." Annotation to Colo. App. R. 38 (citing *Mission Denver Co. v. Pierson*, 674 P.2d 363 (Colo. 1984). In *Eash*, *supra*, the Third Circuit stated, "regarding the wisdom of a local rule on monetary sanctions, *Gamble* [*v. Pope & Talbot, Inc.*, 307 F.2d 729 (3rd Cir.), *cert. denied*, 371 U.S. 888, 83 S. Ct. 187, 9 L.E.2d 123 (1962)] suggested that a national 'uniform approach' was required. However, given that the District Courts vary tremendously in size, volume of cases, calendar congestion, and types of cases, and that litigation tactics of attorneys may differ across the country, it is not readily apparent that a national rule is either required or desirable." *Eash*, 757 F. 2d at 569-570. Although it is tempting to permit state courts to have broad discretion in imposing sanctions in light of the reality that local practice will vary from jurisdiction to jurisdiction, a uniform approach is required as to sanctions levied against appellate parties and counsel to ensure that all receive the protections of due process required by the Constitution, as interpreted by this Court. In addition, by drafting rules that require notice and an opportunity to be heard, all appellate courts that consider sanctions will be on notice of the minimum due process that they must provide to parties and counsel. In *Eash*, the court further noted that, "in the context of judicial disciplinary rules a recent commentator has noted that in 'some instances the potential benefits of continuing experimentation are so obvious, and the costs arising from disuniformity so speculative, that requiring a uniform rule would be premature.'" *Id.* at 570 (quoting Burbank, Procedural Rule Making under the Judicial Counsel's Reform and

Judicial Conduct and Disability Act of 1980, 131 U. Pa. L. Rev. 283, 326 (1982)). This case does not present a situation where the potential benefits from experimentation outweigh the costs—uniformity is essential to ensure that the due process clause is not rendered meaningless by the state courts and to ensure that both attorneys and their clients receive the protection to which they are entitled under the Constitution.

IV. Sanctioning appellate counsel without providing due process will have a chilling effect on litigants who wish to exercise their rights to appeal

Notwithstanding the fact that N.C.R.App.P. 34 harms counsel such as Petitioner by failing to provide the minimum due process required by the Constitution, this rule is also potentially harmful to the parties who seek to vindicate their rights through the appellate process. Individuals who seek review of a trial court's decision thought to be erroneous will be less likely to find counsel willing to take the matter if attorneys face the prospect of appellate sanctions without being provided an opportunity to explain their conduct. In the case *sub judice*, as to the contempt order issue by the trial court, Ms. Whitaker had a right to immediate appeal under North Carolina law. *See* N.C.G.S. §§ 5A-24 and 7A-27. The Court of Appeals of North Carolina recognized this right in the *Whitaker III* opinion prior to imposing the sanctions in the same opinion. (App. 21a). Furthermore, as to the appeal of the order identifying the "fixtures", the Court of Appeals stated, "We note at the outset that this case presents an unusual scenario. Under the terms of the

parties' Settlement Judgment, plaintiff is entitled to remove one-quarter of the 'fixtures' located at the Homesite. This reverses the situation present in most disputes involving fixtures, in which an item is deemed to be a 'fixture' specifically because it is *not* removable." *Whitaker III*, 181 N.C. App. 609 (App. 28a) (citations omitted, emphasis in the original). Notwithstanding the fact that the Court of Appeals acknowledged Ms. Whitaker's right to appeal the contempt order and the novel question of interpretation in construing the term "fixture", the Court of Appeals determined that the appeal was frivolous and dilatory and sanctioned Ms. Whitaker and Petitioner. (App. 37a). Not every loss on the merits justifies the imposition of sanctions; in this case, neither Petitioner nor Ms. Whitaker was provided with an opportunity to explain why prosecuting the appeal should not result in sanctions. If this procedure is permitted to stand, attorneys who have close cases will be less likely to represent an appellant, for fear of being summarily sanctioned for bringing a frivolous appeal, and litigants will be dissuaded from exercising their statutory rights to appeal, even if the appeal involves a matter of first impression.

In addition to the due process guarantees of the United States Constitution, the North Carolina State Constitution provides that, "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have a remedy by due course or law; and right and justice shall be administered without favor, denial, or delay.," N.C. Const. art. I, § 18, and "No rule of procedure or practice shall abridge substantive rights." N.C. Const.

art. IV, § 13(2). The right to open courts "administered without favor, denial, or delay" is lost when appellate courts use N.C.R.App.P. 34 as a mechanism to dissuade attorneys from assisting unpopular litigants or litigants who might be pursuing a just, but unpopular, cause from vindicating their rights through an appeal. N.C.R.App.P. 34 abridges substantive rights by preventing unpopular litigants, such as Ms. Whitaker, and her counsel from pursuing appellate remedies without fear of being sanctioned without being first provided with due process. This use of N.C.R.App. 34 is contrary to the interests of justice, as it will have a chilling effect on litigants who, but for the fear of sanctions, might otherwise pursue a close, but valid appeal.

CONCLUSION

N.C.R.App.P 34 is patently unconstitutional since it does not provide individuals with notice of the court's consideration of sanctions and an opportunity to show cause why sanctions should not be ordered. The fact that the rule states sanctions are possible is not sufficient to put individual litigants and their attorneys on notice that a particular panel of the Court of Appeals is considering sanctioning that particular litigant or attorney. This is especially true in cases, like the one *sub judice*, where the opposing party has not requested attorney's fees, either in a brief or via a motion filed with the appellate court. Further, the rule does not provide individuals with an opportunity to show cause why the court should not issue sanctions. The rule abridges a substantial right by not providing the due process required by the Fourteenth Amendment. For the foregoing reasons, Petitioner

respectfully petitions this Court to issue a Writ of Certiorari for this case and for all other just and proper relief.

Respectfully submitted,

C. Thomas Ross
Counsel of Record for Petitioner
R. Matthew Van Sickle (admission pending)
Ross Law Firm
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(336) 725-7700

APPENDIX

APPENDIX A

SUPREME COURT OF NORTH CAROLINA
For the Twenty-First District

No. 120P07-2

[Filed April 10, 2008]

LOUISA B. WHITAKER	)
	)
V	)
	)
JOHN C. WHITAKER, JR.,	)
ELIZABETH N. WHITAKER, II,	)
AND WILLIAM A WHITAKER	)
	)

Appealed by C. Thomas Ross, Pro Se
From NC Court of Appeals
(06-465)
(07-1497)
From Forsyth
(02CVS1327)

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Appellant (Thomas Ross) on the 21st day of February 2008 in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial

constitutional question filed by the Defendants, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is

"Allowed by order of the Court in conference, this the 10th day of April 2008.

s/ Hudson J.
For the Court"

Upon consideration of the petition filed on the 21st day of February 2008 by Appellant (Thomas Ross) in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference this the 10th day of April 2008.

s/ Hudson, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of April 2008.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

s/_____
Shaula A. Brannan
Assistant Clerk

APPENDIX B

North Carolina Court of Appeals
For the Twenty-First District

COA07-1497

[Filed April 22, 2008]

LOUISA B. WHITAKER,	)
Plaintiff,	)
	)
V	)
	)
JOHN C. WHITAKER, JR.,	)
ELIZABETH N. WHITAKER, II	)
And WILLIAM A WHITAKER,	)
Defendants.	)
	)

ORDER

The Motion to Dismiss Appeal for lack of substantial constitution question is Allowed and Petition for Discretionary Review to review the decision of the North Carolina Court of Appeals filed on the 21st day of February 2008 was denied by order of the North Carolina Supreme Court on the 10th day of April 2008, and same has been certified to the North Carolina Court of Appeals;

IT IS THEREFORE CERTIFIED to the Clerk of Superior Court Forsyth County North Carolina that the North Carolina Supreme Court has allowed the Motion to Dismiss to Appeal for lack of substantial constitutional question filed by the Defendants and denied the Petition for Discretionary Review filed by the Appellant in this cause.

WITNESS my hand and official seal this the 22nd day of April 2008.

S/ John H. Connell
Clerk, North Carolina Court of Appeals

S/ Karen Lowe
Deputy Clerk, North Carolina Court of Appeals

APPENDIX C

NORTH CAROLINA COURT OF APPEALS FROM FORSYTH (02CVS1327)

No. COA07-1497

[Filed February 6, 2008]

LOUISA B. WHITAKER, *Plaintiff*,	)
v.	)
JOHN C. WHITAKER, JR., ELIZABETH N. WHITAKER, II And WILLIAM A WHITAKER, *Defendants*,	)
{Appealed By: C. Thomas Ross, Pro Se, *Appellant*.	)

ORDER

The following order was entered:

The motion filed in this cause on the 22nd day of January 2008 and designated "Appellees' Motion to Dismiss Appeal" is allowed. Appeal dismissed. Appellant to pay costs.

And it is considered and adjudged further, that the Appellant, C. Thomas Ross, do pay the costs of the appeal in this Court incurred, to wit, the sum of Nine Dollars and 00/100 ($9.00), and execution issue therefor.

By order of the Court this the 6th day of February 2008.

The above order is therefore certified to the Clerk of Superior Court Forsyth County.

Witness my hand and official seal this the 6th day of February 2008.

/s/ _____
John H. Connell
Clerk of North Carolina Court of Appeals

APPENDIX D

NORTH CAROLINA, FORSYTH COUNTY, SUPERIOR COURT DIVISION

02 CVS 1327

[Filed June 27, 2007]

LOUISA B. WHITAKER, *Plaintiff,*	)
v.	)
JOHN C. WHITAKER, JR., ELIZABETH N. WHITAKER, II And WILLIAM A. WHITAKER, *Defendants.*	)

ORDER

BEFORE: Ronald E. Spivey, Superior Court Judge Presiding

THIS MATTER came before the Court during the June 25, 2007, session of Civil Superior Court, upon Defendants' Motion for Enforcement of Opinion of North Court of Appeals. William K. Davis and Michael D. Phillips appeared for Defendants. J. Clark Fischer appeared for Plaintiff. C. Thomas Ross appeared on his own behalf. After reviewing the Court

file, the Motion, and accompanying Exhibits, including the Affidavit of Alan M. Ruley regarding attorneys' fees, and upon hearing the parties' arguments and reviewing the Brief submitted by C. Thomas Ross, the Court makes the following Findings of Fact and Conclusions of Law:

1. In an appeal that arose from this civil action, the North Carolina Court of Appeals filed a written Opinion on February 6, 2007, Case No. COA06-465, in which it awarded Defendants their reasonable attorneys' fees for the time spent defending the appeal, pursuant to Rule 34(a) of the North Carolina Rules of Appellate Procedure.

2. The Court of Appeals remanded the matter to the trial court for determination of reasonable attorneys' fees and specifically ordered that the award be imposed jointly against Plaintiff Louisa B. Whitaker and her attorney, C. Thomas Ross.

3. After the Court of Appeals filed its opinion, Plaintiff filed a Petition for Discretionary Review with the Supreme Court of North Carolina, which was denied.

4. C. Thomas Ross did not represent Plaintiff in regards to the Petition for Discretionary Review and should therefore not be held liable for attorneys' fees incurred by Defendants in defending this stage of Plaintiff's appeal.

5. Counsel for Defendants unsuccessfully attempted in good faith to confer with Counsel for Plaintiff and C. Thomas Ross in an effort to collect the

reasonable attorneys' fees awarded by the Court of Appeals without the need for further action by this Court.

6. The Affidavit of Alan M. Ruley establishes that Defendants incurred attorneys' fees in the amount of $14,756.75 in defending the stage of Plaintiff's appeal in the North Carolina Court of Appeals, which the Court finds to be reasonable and necessary.

7. The Affidavit of Alan M. Ruley establishes that Defendants incurred attorneys' fees in the amount of $2,198.75 in defending the stage of Plaintiff's appeal in the Supreme Court of North Carolina, which the Court finds to be reasonable and necessary.

8. The Affidavit of Alan M. Ruley establishes that Defendants incurred attorneys' fees in the amount of $535.75 in preparing the present Motion for Enforcement of Opinion of North Carolina Court of Appeals. At the hearing on this matter, Defendants' attorney Michael D. Phillips stated that Defendants incurred an additional $700.00 in attorneys' fees for the four (4) hours Mr. Phillips spent preparing for and attending the hearing. The Court finds these attorneys' fees, which total $1,235.75, to be reasonable and necessary.

9. Counsel for Plaintiff and C. Thomas Ross on his own behalf did not object to the reasonableness of the amount of attorneys' fees presented by Counsel for Defendants.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendants' Motion for Enforcement

of Opinion of North Carolina Court of Appeals **IS HEREBY GRANTED** and that Defendants shall have and recover attorneys' fees in the amount of $15,992.50, which shall be imposed jointly against Plaintiff Louisa B. Whitaker and her attorney, C. Thomas Ross. Defendants shall additionally have and recover attorneys' fees in the amount of $2,198.75, which shall be imposed solely against Plaintiff Louisa B. Whitaker.

Dated: 6/27/2007

/s/ _____
Ronald E. Spivey
Superior Court Judge Presiding

APPENDIX E

NORTH CAROLINA COURT OF APPEALS

NO. COA06-465
Forsyth County No. 02 CVS 1327

[Filed February 6, 2007]

LOUISA B. WHITAKER, *Plaintiff,*	)
v.	)
JOHN C. WHITAKER, JR., ELIZABETH N. WHITAKER, II And WILLIAM A. WHITAKER, *Defendants.*	)

Appeal by plaintiff from orders entered 4 October 2005, by Judge Joseph R. John, and 17 January 2006, by Judge William Z. Wood, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 19 October 2006.

Ross Law Firm, by C. Thomas Ross, for plaintiff-appellant.

Bell, Davis & Pitt, P.A., by William K. Davis and Alan M. Ruley, for defendants-appellees.

GEER, Judge.

In 2003, plaintiff Louisa B. Whitaker and her siblings, defendants John C. Whitaker, Jr., Elizabeth N. Whitaker, II, and William A. Whitaker, settled four years of ongoing litigation regarding the administration of their deceased mother's estate. The resulting settlement judgment (the "Settlement Judgment") was affirmed by this Court following an appeal by plaintiff. *Whitaker v. Whitaker*, 169 N.C. App. 256, 611 S.E.2d 899, 2005 N.C. App. LEXIS 579, 2005 WL 589482 (2005) (unpublished) (hereinafter "*Whitaker I*"). Plaintiff now appeals from two orders of the superior court relating to the enforcement of the Settlement Judgment's provision that allowed plaintiff to remove one-fourth of the "fixtures" from the family home.

On appeal, plaintiff argues that the first of the trial court's orders erred by concluding that the term "fixtures," as used in the Settlement Judgment, did not include the entire house located on the property as well as the living room flooring and paneling. Plaintiff also contends that the trial court's first order improperly concluded that plaintiff had waived her right to seek additional fixtures beyond those she identified at a hearing to construe the Settlement Judgment. As to the second order, plaintiff argues that it erred by holding her in civil contempt of the first order.

We conclude that the trial court, in the first order, properly determined that the house and the living room flooring and paneling were not fixtures, and we agree with the trial court that plaintiff is precluded

from seeking additional fixtures beyond those that she specified in the hearing. Moreover, we find no error in the trial court's decision to hold plaintiff in contempt of the first order based on her removal of fixtures from the house without authorization. The orders below are, therefore, affirmed.

Facts

In 1991, the parties' mother named defendant John Whitaker and plaintiff as her attorneys-in-fact. In 1999, defendants filed a petition alleging various acts of misfeasance by plaintiff and sought to have her removed as an attorney-in-fact (the "Special Proceeding"). The parties' mother died before this dispute was resolved.

An estate file was opened, and the mother's will was admitted to probate (the "Estate Proceeding"). When the parties could not agree on the administration of their mother's estate, they participated in mediation with a retired superior court judge that resulted in a handwritten Memorandum of Mediated Settlement Agreement (the "Memorandum"). Plaintiff later refused to execute any formalized version of the Memorandum.

Krispy Kreme Doughnut Corporation approached the parties about the possibility of building Krispy Kreme's corporate headquarters on a portion of real estate plaintiff and defendants had inherited under their mother's will (the "Homesite"). Defendants and plaintiff executed an Amendment to the Memorandum (the "Amendment"), which provided that defendant John Whitaker would be the sole spokesperson and

negotiator for the family with Krispy Kreme and that a vote of three out of the four siblings would be binding on the entire group. Additionally, the Amendment provided that defendants would voluntarily dismiss the Special Proceeding, and the parties would "[t]ake such steps as are necessary" to begin administration of their mother's estate, including appointing both defendant John Whitaker and plaintiff as co-executors.

After extensive negotiations, a tentative agreement was reached between defendant John Whitaker and Krispy Kreme, and defendants executed the necessary documents for the sale of the Homesite. Despite the Amendment's requirement that plaintiff do the same, she refused, and the sale to Krispy Kreme fell through.

Plaintiff instituted this action in superior court against defendants, asserting three claims for relief: (1) breach of contract, alleging that defendants had breached the Memorandum and the Amendment; (2) breach of a separate trust agreement relating to their mother's estate; and (3) a request for a declaratory judgment that plaintiff was not bound by the terms of the Amendment. Defendants counterclaimed for breach of contract, interference with contract, unfair and deceptive trade practices, fraud, and punitive damages.

The parties filed cross-motions for partial summary judgment that were granted in part and denied in part, and the case proceeded to trial. At the close of plaintiff's evidence, the trial court granted a directed verdict for defendants on all but one of plaintiff's claims. With defendants' counterclaims remaining to be tried, the parties negotiated a settlement in which

plaintiff agreed to convey her interest in the Homesite to defendants. The trial court thereafter convened a hearing at which the attorneys read into the record the terms of the settlement, which, among other things, included an agreement that: (1) defendants would pay plaintiff $1.35 million; (2) plaintiff would execute deeds prepared by defendants' counsel; and (3) within 60 days of the closing, plaintiff could remove from the Homesite one- quarter of the "fixtures" and any shrubs or plants within a 500- foot radius of the house. Plaintiff, however, ultimately refused to sign a written settlement agreement. On 3 July 2003, defendants moved the trial court for entry of a judgment consistent with the terms of the settlement as stated on the record. The trial court granted the motion, and, on 14 July 2003, Judge Russell G. Walker, Jr. entered the Settlement Judgment, which set forth the terms of the settlement and provided that the closing of the real estate transaction would occur prior to 4 January 2004 unless otherwise agreed. Plaintiff appealed, and this Court affirmed the Settlement Judgment in *Whitaker I*.

The parties waited for this Court's March 2005 decision in *Whitaker I* before closing and, as a result, missed the 4 January 2004 closing date provided for in the Settlement Judgment. Even following *Whitaker I*, however, plaintiff would still not agree to a closing date for the sale of the Homesite. Instead, plaintiff filed a "Motion to Construe" the Settlement Judgment, requesting an interpretation of the term "fixtures." In response, defendants filed a motion seeking to compel plaintiff to close, to hold her in contempt, and for

sanctions.[1] A hearing before Judge Joseph R. John was held on both motions on 23 September 2005. At the hearing, Judge John asked plaintiff's counsel if he could "identify specifically what items may be in controversy." Although plaintiff's counsel broadly argued that "the house itself was a fixture," he specifically stated that plaintiff was really only seeking "light fixtures and things like that," as well as the "[f]looring, paneling, cabinets, [and] doors" from the home's living room so plaintiff could "try to recreate that room where she lives now," and "[s]ome cabinets from the kitchen," "doors to the cabinets in the butler's pantry," and two light fixtures in the dining room. Judge John asked whether there was "[a]nything else" and plaintiff's counsel responded, "That is all, Your Honor." Defendants, in turn, argued that there was no ambiguity in the Settlement Judgment and requested that the trial court set a closing date and sanction plaintiff for delaying the process.

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[1] *Also following this Court's decision in Whitaker I, plaintiff filed a petition in the Estate Proceeding seeking reimbursement for expenses and attorneys' fees she claimed she incurred as co-executor of her mother's estate. Plaintiff appealed the clerk's decision granting and denying in part her requests, urging the superior court to vacate the clerk's order and also declare both the Settlement Judgment and this Court's decision in Whitaker I null and void for lack of subject matter jurisdiction. On 2 June 2005, the trial court entered an order rejecting plaintiff's arguments and affirming the clerk's decision. Plaintiff appealed to this Court during the pendency of the instant appeal, and we affirmed in In re Estate of Whitaker, ___ N.C. App. ___, 633 S.E.2d 849 (2006) ("Whitaker II").*

On 4 October 2005, Judge John filed an order concluding that plaintiff's counsel's argument at the hearing had limited the court's inquiry to a determination whether the following items were fixtures: (1) the living room flooring, paneling, cabinets, doors, and windows; (2) kitchen cabinets; (3) doors to the cabinets in the butler's pantry; and (4) two light fixtures in the dining room. As to these items, Judge John concluded that the living room flooring and paneling were not fixtures, but he was unable to decide whether the remaining items were fixtures without an evidentiary hearing. Judge John specified in his order that either party could request such a hearing. Judge John also determined that plaintiff was precluded from removing any additional fixtures other than those she had identified at the hearing, set the closing on the Homesite for 31 October 2005, and declined to impose any sanctions upon plaintiff.

Neither party requested an evidentiary hearing prior to the 31 October 2005 closing date. Nevertheless, on 31 October 2005, plaintiff declined to close unless defendants provided her with "acknowledgments" that, following delivery of the deeds, plaintiff would retain her rights to obtain property and fixtures from the Homesite under the Settlement Judgment. Defendants declined to do so, and the closing did not occur as scheduled. Plaintiff thereafter appealed Judge John's order and delivered the required deeds to the clerk of superior court "to be held in safe keeping . . . until a final decision by an Appellate Court in North Carolina."

On 2 November 2005, defendants filed a motion seeking delivery of the deeds, an order holding plaintiff

in contempt of both the Settlement Judgment and Judge John's order, and the imposition of sanctions. In response to defendants' notice of hearing, plaintiff filed a written objection, arguing that the trial court lacked jurisdiction as a result of plaintiff's appeal of Judge John's order. At the 10 November 2005 hearing on defendants' motion before Judge William Z. Wood, Jr., plaintiff argued that Judge John's order had impermissibly changed several of the provisions of the Settlement Judgment. Shortly after the hearing, however, the parties completed the closing.

On 14 November 2005, Judge Wood entered an order noting that the deeds had in fact been delivered and that plaintiff would not relinquish any rights she had under the Settlement Judgment to any property or fixtures from the Homesite as a result of her delivery of the deeds. Judge Wood also refused to revisit Judge John's rulings with respect to the Settlement Judgment and declined to find plaintiff in contempt. Judge Wood's order further concluded that the trial court still had jurisdiction to enforce the Settlement Judgment and ordered all parties to comply with Paragraph 1(c) of that judgment, which provided that:

Within sixty (60) days of closing, Plaintiff shall have the right, at Plaintiff's sole expense, to remove from the main house on the Homesite property one-fourth (1/4), by quantity, of: (1) the fixtures; and (2) any shrubs or plantings within a radius of five hundred feet (500') thereof . . . .

As a result of the 10 November 2005 closing, plaintiff's right to remove property determined to be fixtures was due to expire on 9 January 2006.

On 16 December 2005, plaintiff filed a motion requesting, as provided in Judge John's order, an evidentiary hearing to determine "what are or are not removable fixtures" and seeking an extension of the Settlement Judgment's 60-day deadline. Although plaintiff originally sought to have her motion heard 3 January 2006, she later filed an amended calendar request seeking a 9 January 2006 hearing _ the same day her 60-day window was due to close. The evidentiary hearing, however, never occurred, and plaintiff never obtained an extension or stay of the deadline to remove fixtures.

Instead, plaintiff arrived at the Homesite on 7 and 8 January 2006 and removed numerous items herself. Defendants filed a motion to show cause why plaintiff should not be held in contempt of Judge John's order and, at a 10 January 2006 hearing before Judge Wood, defendants submitted affidavits and photographs showing that plaintiff had taken wrought iron plates from the exterior of the front door; the doors from the cabinets in the dining room, the butler's pantry, and the kitchen; the knobs from the drawers in the butler's pantry and the kitchen; and the hardware from the built-in cabinets in the living room and library. Plaintiff's counsel presented no evidence, explaining only that he had told plaintiff to engage in this self-help remedy because he was "afraid the 60 days was going to run."

On 17 January 2006, Judge Wood filed an order (the "Contempt Order") holding plaintiff in willful contempt of Judge John's order. To purge herself of contempt, Judge Wood ordered plaintiff to return and re-install the items she had removed. Judge Wood also

provided that, following the return and re-installation, the parties could again seek the evidentiary hearing originally provided for by Judge John's order. Plaintiff appealed the Contempt Order to this Court and moved the trial court to consolidate her appeals of both the Contempt Order and Judge John's order. The trial court granted plaintiff's motion on 30 January 2006.

Discussion

We must first determine whether this Court has jurisdiction over plaintiff's appeal. With respect to both orders, a decision that "on its face contemplates further proceedings or which does not fully dispose of the pending stage of the litigation is interlocutory." *Watts v. Hemlock Homes of the Highlands, Inc.*, 160 N.C. App. 81, 84, 584 S.E.2d 97, 99 (2003). There is generally no right to appeal an interlocutory order. *Howerton v. Grace Hosp., Inc.*, 124 N.C. App. 199, 201, 476 S.E.2d 440, 442 (1996).

Here, Judge John's order declined to resolve the entire controversy and, instead, left it to the parties to seek an evidentiary hearing to address the remaining issues. Similarly, although the Contempt Order resolves the issue of contempt, it likewise allows for further evidentiary hearings. Such orders are plainly interlocutory. *See, e.g., Alexander v. DaimlerChrysler Corp.*, 158 N.C. App. 637, 643, 582 S.E.2d 57, 61 (2003) (trial court's order declining to approve or disapprove a settlement and voluntary dismissal and, instead, concluding that "a review of the dismissal was necessary," was interlocutory); *McGinnis v. McGinnis*, 44 N.C. App. 381, 387, 261 S.E.2d 491, 495 (1980) (trial court's order was interlocutory when it enforced

out-of-state judgments and ordered additional evidentiary hearings).

An interlocutory order is subject to immediate appeal only if (1) the order is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to Rule 54(b) of the Rules of Civil Procedure, or (2) the trial court's decision deprives the appellant of a substantial right that will be lost absent immediate review. *Howerton*, 124 N.C. App. at 201, 476 S.E.2d at 442. In the present case, however, neither order includes a Rule 54(b) certification and, accordingly, plaintiff must establish that the orders affect a substantial right. *See Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) ("[T]he appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.").

With respect to the Contempt Order, "[t]he appeal of any contempt order . . . affects a substantial right and is therefore immediately appealable." *Guerrier v. Guerrier*, 155 N.C. App. 154, 158, 574 S.E.2d 69, 71 (2002). *See also* N.C. Gen. Stat. § 5A-24 (2005) ("A person found in civil contempt may appeal in the manner provided for appeals in civil actions."). Consequently, this Court may consider plaintiff's appeal of the Contempt Order irrespective of the fact that it provides for further proceedings.

As to Judge John's order, plaintiff argues that when and if the evidentiary hearing is held, the trial court may conclude that Judge John's order did not use

"the proper standard by which to determine what is a fixture," and, therefore, there is "a very real possibility" of "inconsistent verdicts as to what are 'fixtures.'" It is true that "[a] substantial right is affected when '(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists.'" *In re Estate of Redding v. Welborn*, 170 N.C. App. 324, 328, 612 S.E.2d 664, 668 (2005) (quoting *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 735-36, 460 S.E.2d 332, 335 (1995)).

Nevertheless, even assuming *arguendo* that such a decision would amount to an inconsistent verdict, plaintiff's argument overlooks the well-settled principle that one superior court judge may not overrule another. *State v. Woolridge*, 357 N.C. 544, 549, 592 S.E.2d 191, 194 (2003). As a subsequent superior court judge could not rule contrary to Judge John's order, there is no possibility of inconsistent verdicts merely because Judge John issued a ruling with which plaintiff disagreed. To hold otherwise would allow interlocutory appeals in all instances. As a result, we conclude that Judge John's order does not impact plaintiff's substantial rights, and, therefore, that plaintiff's appeal as to that order is interlocutory.[2]

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[2] *Plaintiff also contends that, because Judge John's order concluded that plaintiff had "waived all right" to fixtures beyond what she had requested at the evidentiary hearing, it affected her "substantial right[s] in property," and, therefore, she is entitled to take an interlocutory appeal. As plaintiff cites no authority for this novel proposition, we summarily reject it. See N.C.R. App. P. 28(b)(6) ("The body of the argument . . . shall contain citations of the authorities upon which the appellant relies.").*

Under N.C.R. App. P. 21(a)(1), however, a "writ of certiorari may be issued in appropriate circumstances by [an] appellate court to permit review . . . when no right of appeal from an interlocutory order exists . . . ." This Court, therefore, has discretion under Rule 21 to "treat [a] purported appeal as a petition for writ of certiorari and address the merits." *Mack v. Moore*, 91 N.C. App. 478, 480, 372 S.E.2d 314, 316 (1988), *disc. review denied*, 323 N.C. 704, 377 S.E.2d 225 (1989). *See also Brown v. City of Winston-Salem*, 171 N.C. App. 266, 269, 614 S.E.2d 599, 601 (reaching merits of interlocutory appeal by granting certiorari under N.C.R. App. P. 21), *cert. denied*, 360 N.C. 60, 621 S.E.2d 176 (2005).

The materials in the record, spanning seven years of litigation, indicate that plaintiff's primary goal in *Whitaker I*, *Whitaker II*, and the present action has been to delay resolution of the issues surrounding her mother's estate, including the sale of the Homesite by defendants. Although plaintiff initially agreed to the terms of the Settlement Judgment in open court, requiring her to sell her interest in the Homesite to defendants, she later reneged on that agreement and appealed the trial court's entry of judgment in accordance with those terms. After this Court rejected her appeal in *Whitaker I*, plaintiff continued to subvert the effect of the Settlement Judgment by refusing to comply with its terms, and engaging in a self-help removal of items from the Homesite. She even attempted to void both the Settlement Judgment and *Whitaker I* altogether by filing a collateral challenge in the Estate Proceeding to the subject matter jurisdiction of the trial court to adjudicate *a lawsuit she originally filed* _ an argument this Court later

rejected in *Whitaker II*. Now, plaintiff has filed an interlocutory appeal.

Dismissing plaintiff's appeal of Judge John's order would impose a manifest injustice upon defendants by assisting plaintiff with her apparent long-running agenda of delay. Moreover, as dismissal would undoubtedly only result in a future appeal of the same issues, it would also be a waste of judicial resources. Accordingly, under the extraordinary circumstances of this case, we exercise our discretion under Rule 21 to issue a writ of certiorari and consider the merits of plaintiff's appeal of Judge John's order.

I

We turn now to the Contempt Order. Plaintiff first argues that this order must be reversed because the hearing failed to comply with the procedural requirements of N.C. Gen. Stat. § 5A- 23(a) (2005), which provides that "notice [of a contempt hearing] must be given at least five days in advance of the hearing . . . ." The contempt hearing in the present case was held only one day after defendants' show cause motion was filed, apparently in place of the evidentiary hearing that plaintiff herself had calendared on 22 December 2005.

Nevertheless, "when the contemnor [comes] into court to answer the charges of the show cause order, [s]he waive[s] procedural requirements." *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 583, 273 S.E.2d 247, 260 (1981). Plaintiff attended the contempt hearing, did not object to the trial court's hearing of defendants' show cause motion, and made no effort to pursue her

previously- noticed request for an evidentiary hearing on the disputed fixtures. Indeed, at the hearing, plaintiff actively disputed defendants' motion and made arguments on the issue to the trial court. We conclude that plaintiff's attendance and participation without objection waived any procedural objections to the contempt hearing.

Plaintiff next argues that, notwithstanding any procedural irregularities, she was not in contempt. Failure to comply with a court order is a continuing civil contempt as long as: (1) the order remains in force; (2) the purpose of the order may still be served by compliance with the order; (3) the noncompliance by the person to whom the order is directed is willful; and (4) the person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order. N.C. Gen. Stat. § 5A-21(a) (2005). "This Court's review of a trial court's finding of contempt is limited to a consideration of 'whether the findings of fact by the trial judge are supported by competent evidence and whether those factual findings are sufficient to support the judgment.'" *Gen. Motors Acceptance Corp. v. Wright*, 154 N.C. App. 672, 677, 573 S.E.2d 226, 229 (2002) (quoting *McMiller v. McMiller*, 77 N.C. App. 808, 810, 336 S.E.2d 134, 136 (1985)).

Of the elements of contempt, plaintiff challenges only the first and third, arguing that Judge John's order was no longer in force and that, in any event, she did not violate it willfully. With respect to whether the order was still in force, plaintiff contends that her appeal of Judge John's order divested the trial court of

jurisdiction to hold her in contempt. A party may generally not be held in contempt for "violating the very order then being questioned on appeal." *Upton v. Upton*, 14 N.C. App. 107, 109, 187 S.E.2d 387, 389 (1972). *See also* N.C. Gen. Stat. § 1-294 (2005) ("When an appeal is perfected . . . it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein[.]").

When, however, the order being appealed from is interlocutory, the trial court is not divested of jurisdiction and can, therefore, properly hold a party in contempt for violating the order. *See Onslow County v. Moore*, 129 N.C. App. 376, 387-88, 499 S.E.2d 780, 788, *disc. review denied*, 349 N.C. 361, 525 S.E.2d 453 (1998). *See also Bruggeman v. Meditrust Co., LLC*, 165 N.C. App. 790, 794, 600 S.E.2d 507, 510 (2004) ("[I]t is well established that where an appeal is interlocutory, the trial court need not stay its proceedings while an appellate court decides the appeal."). As plaintiff's appeal of Judge John's order was interlocutory, the trial court could properly hold plaintiff in contempt for violations of that order.

With respect to whether plaintiff's non-compliance was willful, "willful" has been defined in the context of contempt as "disobedience which imports knowledge and a stubborn resistance, and as something more than an intention to do a thing. It implies doing the act purposely and deliberately, indicating a purpose to do it, without authority _ careless whether [the contemnor] has the right or not _ in violation of law . . . ." *Hancock v. Hancock*, 122 N.C. App. 518, 523, 471 S.E.2d 415, 418 (1996) (alteration and omission in

original) (internal quotation marks omitted). Plaintiff does not contest that she willfully removed the items from the Homesite, but, rather, that Judge John's order was so "ambiguous" that plaintiff's non-compliance could not have been willful. *See Blevins v. Welch*, 137 N.C. App. 98, 103, 527 S.E.2d 667, 671 (2000) (noting that willfulness may be negated "[i]f the prior order is ambiguous such that a [party] could not understand his respective rights and obligations under that order").

We, however, find no ambiguity in Judge John's order, which specifically provided, among other things, that: (1) plaintiff had waived her right to seek fixtures beyond those she requested at the hearing and (2) that Judge John was unable to determine whether most of the items plaintiff sought were in fact fixtures without an evidentiary hearing. Without a determination, following an evidentiary hearing, that the items were fixtures, plaintiff had no authority to remove them.

As there was no possibility that plaintiff failed to understand her rights and obligations under these rulings, defendants' affidavits and photographs providing evidence of plaintiff's subsequent removal from the Homesite of both items that she had not requested at the hearing (such as the wrought iron plates from the exterior of the front door) and that Judge John had specifically deferred ruling upon without an evidentiary hearing (such as the doors from the cabinets in the butler's pantry) provided ample evidence to support Judge Wood's finding that plaintiff had willfully violated Judge John's order. *Compare id.* at 101-03, 527 S.E.2d at 670-71 (finding prior order was ambiguous when it could reasonably be

interpreted as including prescriptive easement covering either or both of two roads, and, therefore, that the defendants could not be in contempt of that order for behaving as if it included only one). Accordingly, this assignment of error is overruled.

II

We next turn to plaintiff's argument that Judge John erred in his order by not concluding that the Homesite's living room flooring and paneling, and the house itself, were "fixtures" under the Settlement Judgment. We note at the outset that this case presents an unusual scenario. Under the terms of the parties' Settlement Judgment, plaintiff is entitled to remove one-quarter of the "fixtures" located at the Homesite. This reverses the situation presented in most disputes involving fixtures, in which an item is deemed to be a "fixture" specifically because it is *not* removable. *See, e.g.*, *Moore's Ferry Dev. Corp. v. City of Hickory*, 166 N.C. App. 441, 445, 601 S.E.2d 900, 903 (noting the traditional definition of a fixture as being personal property attached to land or a building in such a way as to become an irremovable part of the real property), *disc. review denied*, 359 N.C. 191, 607 S.E.2d 277 (2004). Additionally, unlike more traditional cases applying the general law of fixtures, the present case involves the parties' use of the term "fixtures" in their Settlement Judgment, and, therefore, presents an issue of interpretation. Accordingly, we limit our holding on this issue to the facts of this case. Although "[a] court with authority to render a judgment also has power to construe and clarify its own judgments," *Reavis v. Reavis*, 82 N.C. App. 77, 80, 345 S.E.2d 460, 462 (1986), such

interpretation is a question of law that is fully reviewable on appeal, *Blevins*, 137 N.C. App. at 101, 527 S.E.2d at 670. Moreover, "'[w]hen a court is called upon to interpret, it seeks to ascertain the intent of the parties at the moment of execution.'" *Cater v. Barker*, 172 N.C. App. 441, 445, 617 S.E.2d 113, 116 (2005) (quoting *Briggs v. Am. & Efird Mills, Inc.*, 251 N.C. 642, 644, 111 S.E.2d 841, 843 (1960)), *aff'd per curiam*, 360 N.C. 357, 625 S.E.2d 778 (2006). When the plain language is clear, "the original intention of the parties is inferred from its words." *Potter v. Hilemn Labs., Inc.*, 150 N.C. App. 326, 331, 564 S.E.2d 259, 263 (2002).

As to whether the house itself is a "fixture," Paragraph 1(c) of the Settlement Judgment provides:

> Within sixty (60) days of closing, Plaintiff shall have the right . . . *to remove from the main house* on the Homesite property one-fourth . . . *[of] the fixtures* . . . .

(Emphases added.) This wording plainly indicates that the parties did not intend the term "fixture" to encompass the house itself. We decline to adopt plaintiff's interpretation of this provision and refuse to hold that the parties intended the Settlement Judgment to grant plaintiff the authority "to remove from the main house" one-quarter of the house itself. *See Avrett & Ledbetter Roofing & Heating Co. v. Phillips*, 85 N.C. App. 248, 253, 354 S.E.2d 321, 324 (1987) ("Instruments should receive sensible and reasonable constructions and not ones leading to absurd or unjust results."). Accordingly, Judge John did not err by rejecting plaintiff's argument that the

house was not a "fixture" under the Settlement Judgment.

This conclusion also resolves plaintiff's argument regarding the living room flooring and paneling. Judge John made the following finding of fact with respect to the flooring and paneling:

7. There was no suggestion by any of the parties that the flooring and paneling in the living room was installed at anytime except at the time of construction of the Homeplace. These items are construction materials and part of the realty. They are not fixtures, as a matter of fact or law, and the Court accordingly so holds. In addition, the Court observes that there is little likelihood that items such as the flooring and paneling could be severed from the realty without causing substantial damage.

Although not specifically assigning error to this finding of fact, plaintiff stated in her first assignment of error that Judge John "erred in holding that flooring and paneling were not fixtures under the factual circumstances existing in May and July 2003, as being contrary to the evidence as to the intent of the parties at these times."

From a review of the transcript, it appears that plaintiff took the position before Judge John that she was entitled to one- fourth of the entire house and that she intended to remove the living room intact _ including walls and floors _ to recreate it elsewhere. Defendants' counsel argued in response, and Judge John found, that doing so would destroy the house. Plaintiff has not argued otherwise, but rather

continues to argue that destruction of the house was the intent of the parties. Neither at trial nor on appeal has plaintiff offered any other basis for finding that the living room flooring and paneling are "fixtures" within the meaning of the Settlement Judgment. Indeed, she states in her brief: "If an entire home can be removed pursuant to the parties' contractual intent, then the parties in this case could have intended, as Appellant strenuously contends, that the flooring and paneling were removable fixtures, irrespective of the fact that the flooring and paneling were part of the original construction at the time of their installation."

Because we have held that the plain language of the Settlement Judgment precludes plaintiff's contention that the entire house is a fixture, we necessarily must conclude that plaintiff has failed to demonstrate that Judge John erred in concluding that she could not remove the living room flooring and paneling.[3]

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[3] *We note in passing that plaintiff's intent argument fails on its own terms. At the time of the Settlement Judgment, the sale to Krispy Kreme had long since fallen through as a result of plaintiff's refusal to comply with the Amendment, a fact that was noted in both Whitaker I and Whitaker II and is clear from the record in this case. Plaintiff offers no explanation as to why, even if she is correct that the parties' intent could transform everything in the house into a fixture, we should hold that it is the parties' intent at the time of the Amendment _ rather than at any other point in history _ that is dispositive. Cf. Brown v. Blake, 86 Ark. App. 107, 116, 161 S.W.3d 298, 304 (2004) (concluding that building containing a liquor store was not a fixture because, at the time the building was built, the parties intended to tear the building down at the expiration of the lease and, therefore, the building lacked the permanence required of a fixture).*

Consequently, we overrule these assignments of error.

III

Plaintiff next contends that by concluding she had waived her right to seek additional fixtures, Judge John both exceeded his authority and improperly overruled Judge Walker's Settlement Judgment. As to whether Judge John exceeded his authority by determining that plaintiff could not seek additional fixtures, "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request . . ., stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(b)(1).

Plaintiff filed her motion to construe the Settlement Judgment because "the parties ha[d] been unable to reach agreement as to the terms of the [Settlement] Judgment . . . having to do with various property and fixtures . . . ." Judge John began the hearing by asking plaintiff if she would "identify specifically what items may be in controversy." When plaintiff's counsel responded only generally, Judge John replied:

You're doing exactly what I asked you not to do. I want to know flooring in what room, light fixtures in what room, and so forth. We need to know what we are talking about here. I suspect _ I may be wrong, but I suspect that's been part of the problem with this dispute coming back before the court.

Plaintiff's counsel then specified the property that plaintiff sought to have declared as fixtures. Judge John asked whether there was "[a]nything else," and plaintiff's counsel responded, "That is all, Your Honor." Plaintiff, therefore, limited the scope of Judge John's inquiry only to a consideration of whether the enumerated items were fixtures.

Following Judge John's ruling at the close of the hearing that plaintiff had waived her right to claim any additional fixtures, plaintiff argued _ consistent with her general approach of avoiding finality _ that she had not meant to surrender her right under the Settlement Judgment to claim, at a later date, that other items were fixtures. In other words, plaintiff had hoped not to be required to identify all of the fixtures she sought, but, rather, to leave open the opportunity for further litigation as to fixtures in the future.

Plaintiff contends that this aspect of Judge John's order effectively overruled the Settlement Judgment's provision that plaintiff could remove one-fourth of the fixtures at the Homesite within 60 days of the closing. "[I]t is well established in our jurisprudence that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Woolridge*, 357 N.C. at 549, 592 S.E.2d at 194 (internal quotation marks omitted).

Judge John's order did not, however, overrule the Settlement Judgment, which remains in full force and effect. *Compare id.* at 550, 592 S.E.2d at 194

(concluding one superior court judge improperly overruled another when trial court "initially grant[ed] defendant's motion to suppress and, upon reconsideration by a different judge, den[ied] the motion to suppress"). Rather, Judge John merely construed the Settlement Judgment, as requested by plaintiff's motion. As noted above, "[a] court with authority to render a judgment also has power to construe and clarify its own judgments." *Reavis*, 82 N.C. App. at 80, 345 S.E.2d at 462.

Given that plaintiff calendared the hearing so that the court could determine for the parties what properly constituted fixtures within the meaning of the Settlement Judgment, she cannot now complain that Judge John, in deciding her motion, required her to identify what property was at issue. Indeed, this approach is required by N.C.R. App. P. 10(b) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, . . . stating *the specific grounds* for the ruling the party desired the court to make . . . ." (emphasis added)). These assignments of error are overruled.

IV

"A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that an appeal or any proceeding in an appeal was frivolous because . . . the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation[.]" N.C.R. App. P. 34(a). As we conclude that plaintiff's appeal was taken

for an improper purpose, we remand for the entry of sanctions against both plaintiff and her counsel under N.C.R. App. P. 34(c). *McGowan v. Argo Travel, Inc.*, 131 N.C. App. 694, 695, 507 S.E.2d 601, 602 (1998).

It is apparent from the record that plaintiff's primary goal in the present action _ as well as *Whitaker I* and *Whitaker II* _ has been to delay resolution of the issues surrounding her mother's estate, including the sale of the Homesite. To accomplish this goal, plaintiff has engaged the courts of this State in extensive and inappropriate legal gamesmanship, including: the refusal to comply with the Amendment; the refusal to comply with the terms of the Settlement Judgment; attempts to void the Settlement Judgment following its affirmance in *Whitaker I*; an attempt to litigate the identity of the Homesite's fixtures on a piecemeal basis; the filing of an improper interlocutory appeal interposed to divest the trial court of jurisdiction; nonetheless calendaring an evidentiary hearing on the day her 60-day window for removal of fixtures was to expire; and, rather than proceeding with that hearing, engaging in a self-help remedy that apparently defaced the Homesite and was in violation of a court order.

Moreover, in addition to the pattern of conduct set out in the record that suggests an intent to delay, we are troubled by the fact that plaintiff has routinely taken inappropriately inconsistent positions throughout this and the related litigation without ever acknowledging that she has done so. These inconsistent positions likewise appear directed more towards delaying the proceedings than litigating plaintiff's legal interests. *Cf. Whitacre P'ship v.*

BioSignia, Inc., 358 N.C. 1, 22,591 S.E.2d 870, 884 (2004) (noting that, under the doctrine of judicial estoppel, "'[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position'" (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749, 149 L. Ed. 2d 968, 977, 121 S. Ct. 1808, 1814 (2001))).

Following the collapse of the Krispy Kreme deal, plaintiff filed suit against defendants and appealed certain provisions of the Settlement Judgment. In that appeal, plaintiff did not seek to have the entire judgment reversed _ for example, plaintiff did not challenge the Settlement Judgment's provisions relating to her being paid $1.35 million or being allowed to remove fixtures from the Homesite. After this Court rejected plaintiff's appeal in *Whitaker I*, however, plaintiff changed position in *Whitaker II* and argued that the trial court in *Whitaker I* had lacked subject matter jurisdiction to adjudicate the very lawsuit she had filed and, therefore, that both the entire Settlement Judgment and *Whitaker I* were void. Now, in the present appeal _ filed prior to this Court's decision in *Whitaker II* _ plaintiff contends that Judge John's order must be reversed because it limits plaintiff's rights under the Settlement Judgment. In other words, while plaintiff argued in *Whitaker II* that the Settlement Judgment was void, plaintiff simultaneously argued in the present appeal that Judge John's order was void as contrary to the Settlement Judgment. Similarly, although plaintiff argues on this appeal that the Contempt Order is invalid because her appeal of Judge John's order stayed proceedings in the trial court, plaintiff

nevertheless, after her appeal, calendared the evidentiary hearing provided for in Judge John's order. Thus, according to plaintiff, although her appeal of Judge John's order stayed the order's effect insofar as holding her in contempt, her appeal did not stay the order with respect to her ability to obtain an evidentiary hearing.

We hold that the conduct of both plaintiff and her counsel, dedicated not to the proper resolution of disputed legal issues but to delay, amounts to the repeated pursuit of an improper purpose and runs afoul of N.C.R. App. P. 34(a). *See, e.g.*, *McGowan*, 131 N.C. App. at 695, 507 S.E.2d at 601 (imposing sanctions when case was "one in a long progeny of cases" involving the same parties and issues). Accordingly, we hold that defendants should be awarded reasonable attorneys' fees for the time spent in defending this appeal. We remand the matter to the trial court for a determination of reasonable attorneys' fees with the award to be imposed jointly against plaintiff and her counsel. N.C.R. App. P. 34(c).

Affirmed.
Judges STEELMAN and STEPHENS concur.

Report per Rule 30(e).

NC
Unpublished App.

APPENDIX F

IN RE MATTER OF ESTATE OF WHITAKER,
179 N.C. App. 375 (2006)

633 S.E.2d 849

North Carolina Court of Appeals.

No. COA05-1328.

[Filed September 5, 2006]

IN THE MATTER OF THE ESTATE)
OF ELIZABETH N. WHITAKER)
)

1. Jurisdiction — subject matter — settlement agreements — oral settlement

The trial court did not lack subject matter jurisdiction in an action seeking enforcement of a settlement entered into by petitioner and respondents, because: (1) contrary to petitioner's assertions, the order and judgment in Whitaker I did not address the administration, settlement, and distribution of estates of decedents under N.C.G.S. § 28A-2-1, but instead involved petitioner's claims that respondents were not complying with the parties' prior settlement agreements arising out of a mediation which are matters within the superior court's subject matter

jurisdiction; and (2) the superior court also had jurisdiction over petitioner's lawsuit relating to the memorandum, the amendment, and the trust agreement not resolved by the first trial court after the parties reached an oral settlement of those remaining issues with the judgment merely enforcing the settlement entered on the record.

2. Appeal and Error — notice of appeal — general objection

Although petitioner contends the trial court erred when it stated that petitioner's notice of appeal made only a general objection to the clerk's order, petitioner failed to demonstrate any harm from the trial court's observation, because: (1) despite its belief that petitioner's notice of appeal was inadequate because it constituted only a general objection, the trial court conducted a full review of the clerk's order; and (2) the notice of appeal did constitute only a general objection under N.C.G.S. § 1-301.3 when petitioner's appeal to the superior court did not refer specifically to any of the clerk's sixty-six findings of fact and constituted only a broadside attack on the findings of fact.

Appeal by petitioner from an order entered 2 June 2005 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 12 April 2006.

Ross Law Firm, by C. Thomas Ross, for petitioner-appellant.

Bell, Davis & Pitt, P.A., by William K. Davis, Alan M. Ruley, and

Edward B. Davis, for respondents-appellees.

GEER, Judge.

In an apparent attempt to avoid this Court's decision in *Whitaker v. Whitaker*, 169 N.C. App. 256, 611 S.E.2d 899, 2005 N.C. App. LEXIS 550, 2005 WL 589482 (Mar. 15, 2005) (unpublished) (hereinafter "*Whitaker I*"), affirming the trial court's enforcement of a settlement entered into by petitioner Louisa B. Whitaker and respondents, petitioner requested in this action that the clerk of superior court and the superior court declare as void for lack of subject matter jurisdiction *Whitaker I* and its underlying orders. Petitioner appeals from the superior court's order affirming the clerk's order, asserting that both the superior court and the clerk erred in rejecting her subject matter jurisdiction argument. Even assuming that petitioner's argument was properly raised in this proceeding, because the lawsuit in *Whitaker I* was a breach of contract action brought *by petitioner* to enforce various settlement agreements entered into by the parties and did not involve issues within the exclusive jurisdiction of the clerk, we affirm.

Facts

Respondents (John C. Whitaker, Elizabeth N. Whitaker, II, and William A. Whitaker) and petitioner, who are all siblings, have been involved in a series of legal disputes relating to their mother and the administration of her estate for the past seven years. In 1991, the parties' mother named respondent John Whitaker and petitioner as her attorneys-in-fact. In 1999, respondents filed a petition alleging various acts

of misfeasance by petitioner and sought to have her removed as attorney-in-fact (the "Special Proceeding").

Before the Special Proceeding was resolved, the parties' mother died, an estate file was opened (the "Estate Proceeding"), and the mother's will was admitted to probate. When the parties could not agree on the administration of their mother's estate, they participated in mediation with Judge James M. Long, a retired superior court judge. That mediation resulted in a handwritten Memorandum of Mediated Settlement Agreement (the "Memorandum"). Subsequently, petitioner refused to execute any formalized version of the Memorandum.

Under their mother's will, petitioner and respondents inherited, among other things, multiple pieces of real property as joint tenants. Krispy Kreme Doughnut Corporation approached the parties about the possibility of building Krispy Kreme's corporate headquarters on a portion of this real estate. Respondents and petitioner then executed an Amendment to Memorandum of Mediated Settlement Agreement (the "Amendment"). The Amendment provided that respondent John Whitaker would be the sole spokesperson and negotiator for the family with Krispy Kreme and that a vote of three out of the four siblings would be binding on the entire group. Additionally, the Amendment provided that respondents would voluntarily dismiss the Special Proceeding and the parties would "[t]ake such steps as are necessary" to begin administration of their mother's estate, including appointing both respondent John Whitaker and petitioner as co-executors.

After extensive negotiations, a tentative agreement was reached between respondent John Whitaker and Krispy Kreme. Respondents thereafter executed the necessary documents for the sale of the property. Although the Amendment required petitioner to do the same, when she was asked to execute the documents necessary to finalize the sale, she refused, and the sale to Krispy Kreme fell through.

Petitioner then sued respondents in superior court (civil action number 02 CVS 1327), asserting three claims for relief: (1) breach of contract, alleging that respondents had breached the Memorandum and the Amendment; (2) breach of a trust agreement relating to their mother's estate; and (3) a request for a declaratory judgment that petitioner was not bound by the terms of the Amendment. Respondents counterclaimed for breach of contract, interference with contract, unfair and deceptive trade practices, fraud, and punitive damages.

The parties filed cross-motions for partial summary judgment, which were granted in part and denied in part by Judge Clarence E. Horton, Jr. With respect to petitioner's claim that defendants had breached the Memorandum and the Amendment by refusing to approve payment of $40,937.50 in executor's fees, Judge Horton observed that the parties were in agreement on the issue and ordered that petitioner was entitled to executor's fees of $40,937.50, and respondent John Whitaker was entitled to executor's fees of $59,062.50. Judge Horton's order further provided that "summary judgment is granted in favor of [respondents] on [petitioner's] claim for reimbursement for estate expenses," but that "this

ruling is without prejudice to the right of [petitioner] . . . to seek reimbursement of alleged estate expenses in the pending estate proceeding before the Clerk." Additionally, Judge Horton's order concluded that, under the terms of the Memorandum and the Amendment, "the attorneys for each side *may* be paid fees and expenses by or on behalf of the estate to a maximum of $35,000.00" and, therefore, ordered that "each side's attorney's fees and expenses *shall* be paid by or on behalf of the Estate, up to a maximum of $35,000.00." (Emphasis added.) Judge Horton made various other rulings regarding petitioner's claims that are not pertinent to this appeal.

The case proceeded to trial before Judge Russell G. Walker, and, at the close of petitioner's evidence, Judge Walker granted a directed verdict for respondents on all but one of petitioner's remaining claims. At that point, with respondents' counterclaims remaining to be tried, the parties negotiated a settlement in which petitioner agreed to convey her interest in the disputed real estate to respondents. Judge Walker thereafter convened a hearing at which the attorneys read the terms of the settlement into the record, which included: (1) respondents would pay petitioner $1.35 million; (2) petitioner would "execute deeds prepared by [respondents'] counsel"; (3) petitioner could remove a portion of the fixtures attached to the real estate; (4) executors' commissions and attorneys' fees were to be paid in accordance with Judge Horton's order; (5) the amounts remaining in the estate, after payment of the applicable attorneys', executors', and mediator fees, would be divided equally among the parties; (6) the parties would execute "[c]omplete mutual general releases"; and (7) any

further disputes would be subject to binding arbitration.

When counsel for petitioner asked whether the agreement would be reduced to writing, counsel for respondents stated: "I hope we have more success than we did [previously], but if we don't, we have a judge who can help us because we're stating this on the record in the presence of the Court so that the Court can then enforce the settlement agreement." Judge Walker then asked each of the parties, "Do you agree and accept this settlement agreement and will you sign, execute and do whatever else is necessary — the documents that are necessary to bring this about?" Petitioner and each of the respondents stated their assent on the record.

Petitioner ultimately refused to sign a written settlement agreement. Consequently, on 3 July 2003, respondents moved the trial court for entry of a judgment consistent with the terms of the settlement as stated on the record. Judge Walker granted the motion, and, on 14 July 2003, entered judgment setting forth the terms of the settlement. Petitioner appealed, and this Court affirmed the trial court's judgment in *Whitaker*,

I.

Following this Court's decision in *Whitaker I*, petitioner filed a petition in the Estate Proceeding seeking, among other things, reimbursement for expenses and attorneys' fees she claimed she incurred as co-executor of her mother's estate. On 18 February 2005, after holding a hearing on the matter, the clerk

entered findings of fact and conclusions of law in a 21-page document that included 66 findings of fact and concluded that petitioner's request for reimbursement should be granted in part and denied in part.

On the same date, the clerk entered an order setting forth her precise rulings on each request. She denied the request for reimbursement for flowers, for grave lot cleaning, in part for rug cleaning, for mileage and other expenses, and for additional legal fees above the $35,000.00 already paid to the attorneys for each side. She granted the request for reimbursement for a grave marker, for a real estate appraisal, in part for rug cleaning, and for moving expenses and repair costs. Petitioner appealed to the superior court.

After holding a hearing on petitioner's appeal, Judge Ronald E. Spivey entered an order on 2 June 2005. In his order, he noted that petitioner, in addition to asking the court to vacate the clerk's order, "sought to have this Court declare as null and void, for lack of subject matter jurisdiction, (1) the Order of The Honorable Clarence E. Horton, Jr., filed on May 15, 2003, in Civil Action No. 02 CVS 1327, in Forsyth County Superior Court; (2) the Judgment signed by The Honorable Russell G. Walker, Jr., and filed on July 14, 2003, in 02 CVS 1327; and (3) the Order of the North Carolina Court of Appeals, filed on March 15, 2005, No. COA 04-10, which affirmed the Judgment of Judge Walker in 02 CVS 1327 in its entirety." Judge Spivey concluded that the clerk's findings of fact were supported by the evidence and that the conclusions of law were supported by the findings of fact. He, therefore, affirmed the clerk's findings of fact, conclusions of law, and order in their entirety. Judge

Spivey further ruled that the arguments regarding the orders and Court of Appeals opinion in *Whitaker I* constituted "an impermissible collateral attack . . . and that estoppel applies to prevent such an attack." Petitioner timely appealed to this Court from Judge Spivey's order.

I

All but one of petitioner's 10 assignments of error are based upon petitioner's contention that Judge Horton's order and Judge Walker's judgment in 02 CVS 1327 (which was affirmed in *Whitaker I*) are void because of a lack of subject matter jurisdiction. We need not address the specifics of each assignment of error or whether Judge Spivey properly concluded this argument constituted an impermissible collateral attack since we hold that the superior court did not lack subject matter jurisdiction.

"[O]riginal general jurisdiction of all justiciable matters of a civil nature cognizable in the General Court of Justice is vested in the aggregate in the superior court division and the district court division. . . ." N.C. Gen. Stat. § 7A-240 (2005). "It is, therefore, evident that except for areas specifically placing jurisdiction elsewhere (such as claims under the Workers' Compensation Act) the trial courts of North Carolina have subject matter jurisdiction over all justiciable matters of a civil nature." *Harris v. Pembaur*, 84 N.C. App. 666, 668, 353 S.E.2d 673, 675 (1987) (internal quotation marks omitted).

Petitioner contends that *Whitaker I* did not involve a general civil matter, but rather resolved issues

within the original and exclusive jurisdiction of the clerk of superior court. Under N.C. Gen. Stat. § 7A-241 (2005), "[e]xclusive original jurisdiction for the probate of wills and the administration of decedents' estates is vested in the superior court division, and is exercised by the superior courts and by the clerks of superior court as ex officio judges of probate according to the practice and procedure provided by law." Thus, it is "[t]he clerk of superior court of each county . . . [that has] jurisdiction of the administration, settlement, and distribution of estates of decedents. . . ." N.C. Gen. Stat. § 28A-2-1 (2005). *See also In re Estate of Adamee*, 291 N.C. 386, 395, 230 S.E.2d 541, 548 (1976) ("These statutes . . . clearly give the clerk exclusive original probate jurisdiction.").

Nevertheless, contrary to petitioner's contentions, the order and judgment in *Whitaker I* did not address "the administration, settlement, and distribution of estates of decedents. . . ." N.C. Gen. Stat. § 28A-2-1. Rather, the *Whitaker I* litigation involved petitioner's claims that respondents were not complying with the parties' prior settlement agreements arising out of a mediation. In his partial summary judgment order, Judge Horton was determining whether there were issues of fact regarding the terms of the parties' agreement following the mediation. There can be no doubt that the superior court has subject matter jurisdiction over such claims. *See, e.g., Chappell v. Roth*, 353 N.C. 690, 692, 548 S.E.2d 499, 500 (2001) ("This Court has previously stated that compromise agreements, such as the mediated settlement agreement reached by the parties in this case, are governed by general principles of contract law."); *DeGree v. DeGree*,

72 N.C. App. 668, 670, 325 S.E.2d 36, 37 ("ordinary contract[s]" are enforceable by trial courts), *disc. review denied*, 313 N.C. 598, 330 S.E.2d 607 (1985).

Subsequently, petitioner's lawsuit went to trial as to the issues relating to the Memorandum, the Amendment, and the trust agreement not resolved by Judge Horton. After the parties reached an oral settlement of those remaining issues, Judge Walker's judgment merely enforced the settlement entered on the record. Again, the superior court undoubtedly had jurisdiction. *See, e.g., Few v. Hammack Enters., Inc.*, 132 N.C. App. 291, 299, 511 S.E.2d 665, 671 (1999) (trial court may order specific performance of the terms of a mediated settlement agreement).

Consequently, petitioner's contention that the superior court lacked subject matter jurisdiction in the *Whitaker I* action is without merit. The nine assignments of error that rely upon that contention are, therefore, overruled.

II

Petitioner contends in her remaining assignment of error that the trial court erred when it stated that petitioner's notice of appeal made only a "general objection" to the clerk's order. Petitioner has, however, failed to demonstrate any harm from Judge Spivey's observation.

Judge Spivey's order specifies:

> The Court has reviewed, paragraph-by-paragraph, the Clerk's Findings of Fact,

> Conclusions of Law and Order. The Court has also reviewed portions of the transcript of the hearing before the Clerk held on January 18, 2005, together with an Affidavit of a witness at that hearing relating to matters that were alleged not to be contained in the record. . . .
>
> The Court concludes, as a matter of law, pursuant to N.C.G.S. § 1-301.3, that the Clerk's Findings of Fact are supported by the evidence; the Clerk's Conclusions of Law are supported by the Findings of Fact; and the Clerk's Order is consistent with the Conclusions of Law and the applicable law in the State of North Carolina.

In short, despite his belief that petitioner's notice of appeal was inadequate as a general objection, Judge Spivey conducted a full review of the Clerk's order.

Moreover, we agree with Judge Spivey that petitioner's notice of appeal constituted only a general objection under N.C. Gen. Stat. § 1-301.3 (2005). On appeal of estate matters determined by the clerk, the superior court reviews an order of the clerk for purposes of determining: (1) whether the findings of fact are supported by the evidence; (2) whether the conclusions of law are supported by the findings of fact; and (3) whether the order or judgment is consistent with the conclusions of law and applicable law. N.C. Gen. Stat. § 1-301.3(d). The superior court, however, only reviews those "findings of fact *which the appellant has properly challenged by specific exceptions.*" *In re Estate of Lowther*, 271 N.C. 345, 354, 156 S.E.2d 693, 700-01 (1967) (emphasis added). *See also In re Estate of Longest*, 74 N.C. App. 386, 390, 328

S.E.2d 804, 807 ("Thus, in an appeal from an order of the Clerk in a probate matter, the Superior Court is not required to conduct a *de novo* hearing. Rather, . . . *when a finding of fact by the Clerk of Court is properly challenged by specific exception*, the Superior Court judge will review those findings, and either affirm, reverse, or modify them." (internal citation and quotation marks omitted) (emphasis added)), *appeal dismissed and disc. review denied*, 314 N.C. 330, 330 S.E.2d 488 (1985).

In the present case, petitioner's appeal to the superior court did not refer specifically to any of the clerk's 66 findings of fact. Instead, petitioner's appeal states only:

> [T]he findings of fact are not supported by evidence, the conclusions of law are not supported by the findings of fact, and the order is inconsistent with the conclusions of law, prior court orders and applicable law.

This statement constitutes only a broadside attack on the findings of fact and thus the trial court did not err by concluding that petitioner had only made a "general objection." *See, e.g., Wade v. Wade*, 72 N.C. App. 372, 375-76, 325 S.E.2d 260, 266 (1985) ("A single assignment generally challenging the sufficiency of the evidence to support numerous findings of fact, as here, is broadside and ineffective."), *disc, review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).

Affirmed.

Judges TYSON and JACKSON concur.

APPENDIX G

WHITAKER v. WHITAKER, 169 N.C. App. 256, 612 S.E.2d 445 (2005)

This case not for publication

North Carolina Court of Appeals.

No. COA04-10

[Filed March 15, 2005]

LOUISA B. WHITAKER, Plaintiff,	)
v.	)
JOHN C. WHITAKER, JR., ELIZABETH N. WHITAKER, II and WILLIAM A. WHITAKER, Defendants.	)

Forsyth County, No. 02 CVS 1327.

Appeal by plaintiff from judgment entered 14 July 2003 by Judge Russell G. Walker, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 15 September 2004.

Sharpless & Stavola, P.A., by Frederick K. Sharpless and Eugene E. Lester, III, for plaintiff-appellant.

Bell, Davis & Pitt, P.A., by William K. Davis and Alan M. Ruley, for defendants-appellees.

GEER, Judge.

This case arises out of a dispute among family members over real property that the children inherited from their parents. Plaintiff Louisa B. Whitaker filed suit against her siblings John C. Whitaker, Jr., Elizabeth N. Whitaker, II, and William A. Whitaker (collectively "defendants") when the parties could not agree on how the property should be managed. In the middle of the trial of this action, the parties reached a settlement agreement that was read into the record with the trial judge obtaining each individual party's express assent to the terms of the agreement. After plaintiff subsequently refused to sign defendants' proposed consent judgment, defendants moved for entry of judgment enforcing the terms of the settlement agreement as recited into the record. Plaintiff appeals from the resulting judgment, arguing that the trial judge altered the terms of the parties' agreement. Because we hold the judgment properly reflected the terms of the agreement, we affirm.

Facts

The parties to this case are the sons and daughters of John and Elizabeth Whitaker. John C. Whitaker, Sr. died in 1978 and his widow Elizabeth passed away in 2000. Upon Elizabeth Whitaker's death, the four children inherited multiple pieces of real property from

their parents as joint tenants, including two Winston-Salem parcels (identified as "the Homesite" and "Spicewood") and a parcel in Roaring Gap, North Carolina.

Since their mother's death, there have been a series of disputes between plaintiff and defendants. When plaintiff and defendants could not agree regarding the administration of their mother's estate, they participated in a mediation that resulted in a handwritten Memorandum of Mediated Settlement Agreement ("the Memorandum") on 9 November 2000. Subsequently, however, plaintiff refused to sign any formal settlement agreement.

Krispy Kreme Doughnut Corporation expressed a desire to purchase the Homesite property for its corporate headquarters. Because of Krispy Kreme's interest in the Homesite, the siblings executed an Amendment to Memorandum of Mediated Settlement Agreement ("the Amendment"), addressing how negotiations with Krispy Kreme would proceed. The Amendment provided that one family member would be the sole spokesperson and negotiator and that a vote of three out of the four siblings would be binding on the entire group. All of the siblings, including plaintiff, executed the Amendment.

After extensive negotiations, a tentative agreement was reached between John Whitaker (the designated negotiator) and Krispy Kreme regarding the Homesite property. The three defendants —John, Elizabeth, and William Whitaker—approved the sale and executed the necessary documents. Under the Amendment, plaintiff was required to execute similar documents.

When plaintiff was asked to execute the documents necessary to finalize the sale, she refused despite her agreement to the Amendment.

Plaintiff instead filed this lawsuit against defendants. She claimed that defendants breached the Memorandum, the Amendment, and a trust agreement pertaining to their mother's estate and sought a declaratory judgment that she was not bound by the terms of the Amendment. Defendants counterclaimed for breach of contract, interference with contract, unfair and deceptive trade practices, fraud, and punitive damages. After cross-motions for summary judgment were granted in part and denied in part, plaintiff filed a notice of appeal. The trial court ruled that the order granting partial summary judgment was not immediately appealable because it did not affect a substantial right. This Court denied plaintiff's petition for writ of certiorari. The trial on plaintiff's remaining claims and on defendant's counterclaims commenced before Judge Russell G. Walker, Jr. on 19 May 2003. At the close of plaintiff's evidence, the trial court granted defendant's motion for a directed verdict as to all but one of plaintiff's remaining claims. At this point, the parties negotiated a settlement agreement intended to resolve all the remaining disputes between the parties. In particular, defendants agreed to pay plaintiff $1.35 million in exchange for plaintiff's "execut[ing] deeds prepared by defendant's counsel" conveying all of her interest in the Homesite, Spicewood, and Roaring Gap parcels, with closing to take place by 4 January 2004.

The attorneys notified the trial court of the settlement and the court, on 27 May 2003, convened

the parties for a hearing at which the attorneys read the terms of the agreement into the record. When counsel for plaintiff asked whether the agreement would be reduced to writing, counsel for defendants stated: "I hope we have more success than we did in the year 2000, but if we don't, we have a judge who can help us because we're stating this on the record in the presence of the Court so that the Court can then enforce the settlement agreement." Counsel for plaintiff responded: "That's my understanding." The trial judge then asked each of the parties, "Do you agree and accept this settlement agreement and will you sign, execute and do whatever else is necessary — the documents that are necessary to bring this about?" Plaintiff and each of the defendants stated their agreement on the record. On 3 July 2003, after the parties could not agree on a written settlement agreement, defendants filed a motion in the cause asking the trial court for a judgment incorporating the terms of the settlement agreement read into the record on 27 May 2003. On 14 July 2003, the trial court entered the judgment from which plaintiff appeals.

Discussion

Plaintiff assigns as error the trial court's requirement that plaintiff execute and deliver to defendants general warranty deeds to the real estate

at issue.[1] Plaintiff contends that in doing so, the trial court improperly altered and added to the terms of the parties' settlement agreement.

"It is well-settled in North Carolina that compromises and settlements of controversies between parties are favored by our courts." *State ex rel. Howes v. Ormond Oil & Gas Co.*, 128 N.C. App. 130, 136, 493 S.E.2d 793, 796 (1997). When, as here, the parties have entered into an oral settlement agreement and one party refuses to sign a formal, written settlement agreement, the other party may seek specific enforcement of the settlement and a trial court "may enter a judgment . . . in accordance with the terms found in the parties' settlement agreement." *Id.* at 137, 493 S.E.2d at 797. *See also Currituck Assocs. v. Hollowell*, ___ N.C. App. ___, ___, 601 S.E.2d 256, 261 ("[W]e are bound by our previous determination that a settlement agreement may be enforced by filing a new action or by filing a motion in the cause. . . ."), *disc. review denied and appeal pending on other grounds*, 359 N.C. 187, 606 S.E.2d 902 (2004). In entering judgment, however, a trial court may not deviate from the original agreement by adding or altering terms; it may only put into effect the terms that the parties agreed upon. *Laing v.Lewis*, 133 N.C. App. 172, 176, 515 S.E.2d 40, 43 (1999).

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[1] Plaintiff has not brought forward into her brief a second assignment of error and it is, therefore, deemed abandoned. N.C.R.App.P. 28(a). Plaintiff also moved to amend the record and add three more assignments of error. That motion has been denied.

With respect to the issue of the deeds to be executed by plaintiff, the in-court settlement agreement provided:

> Number one; defendants will pay plaintiff a total of 1.35 million dollars. *Plaintiff shall execute deeds prepared by defendant's counsel* conveying all of her interest in the [Homesite], Spicewood, and Roaring Gap to the defendants unless otherwise agreed. . . .

(Emphasis added.)

The trial court's judgment specified on this issue:

> Plaintiff and/or her LLC, Whitacres Enterprises, LLC, *shall execute and deliver to Defendants general warranty deeds, to be prepared by counsel for Defendants,* conveying all of their right, title and interest in the Whitaker Homesite property . . . the Spicewood property . . . and the Roaring Gap property. . . .

(Emphasis added.)

Plaintiff contends that by requiring plaintiff to execute "general warranty deeds," the trial court added a term to the contract. Plaintiff suggests that a quitclaim deed should be used because there was no agreement as to the form of the deed or warranties of title. We disagree. Plaintiff agreed, in open court, to sign "deeds prepared by defendant[s'] counsel." This language required plaintiff to sign the deed that defendants provided, regardless whether plaintiff disagreed with the specific form. Plaintiff did not

reserve the right to object to or approve the deeds defendants' counsel prepared. For their part, defendants were required to act reasonably and in good faith when drawing up the deeds. *Gallimore v. Daniels Constr. Co.*, 78 N.C. App. 747, 751-52, 338 S.E.2d 317, 319 (1986) (holding that there is a duty of good faith and fair dealing and a duty of cooperation on the part of both parties to a settlement agreement). *See also* Joseph M. Perillo, *Calamari and Perillo on Contracts* § 11.38(a) (5th ed. 2003) ("[I]n the area of indefiniteness where a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise the discretion in good faith and in accordance with fair dealing." (internal quotation marks omitted)).

Plaintiff has not argued that a general warranty deed was unreasonable or in bad faith. Indeed, given that defendants were paying plaintiff $1.35 million with the expectation that it would settle all issues in dispute, it would not be unreasonable to expect that defendants would find a quitclaim deed unacceptable. Plaintiff simply preferred a quitclaim deed. If so, she needed to negotiate that term instead of agreeing broadly to execute the deeds prepared by defendants' counsel. *See Currituck Assocs.*, ___ N.C. App. at ___, 601 S.E.2d at 265 (affirming trial court's enforcement of settlement because "we conclude appellants could have reasonably protected themselves by the terms of the settlement agreement," but did not).

Because of this agreement and defendants' insistence that the deeds be general warranty deeds, the trial court did not alter the terms of the agreement by providing in its judgment that plaintiff was

required to sign general warranty deeds in transferring the real estate to defendants. The trial court did not add or alter the terms but instead simply enforced the contract. Accordingly, we affirm.

Affirmed.

Judges HUNTER and LEVINSON concur.

Report per Rule 30(e).

APPENDIX H

North Carolina Reports

ORDER ADOPTING AMEND., RULE 34, RU. OF APP. PROC., 766 (1998)

Order Adopting Amendment to the Rule 34 of the Rules of Appellate Procedure

North Carolina Court of Appeals

Filed 15 September 1998

Order Adopting Amendment to the Rule 34 of the Rules of Appellate Procedure

Rule 34(d) is hereby amended to read as follows:

(d) ~~If a court of the appellate division deems a sanction appropriate under this rule, the court shall order the person subject to sanction to show cause in writing or in oral argument or both why a sanction should not be imposed~~. If a court of the appellate division remands the case to the trial division for a hearing to determine a sanction under (c) of this rule, the person subject to sanction shall be entitled to be heard on that determination in the trial division.

Adopted by the Court in Conference this 8th day of April 1999. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme

Court and the Court of Appeals. This amendment shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.aoc.state.nc.us).

S/ Wainwright, J.
For the Court

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(2)

No. 08-54

FILED
AUG 5 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

C. THOMAS ROSS,

Petitioner,

v.

JOHN C. WHITAKER, JR.,
ELIZABETH N. WHITAKER, II,
and WILLIAM A. WHITAKER,

Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeals Of North Carolina

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Supreme Court should grant a Writ of Certiorari to review an unpublished opinion by the North Carolina Court of Appeals containing an order sanctioning Petitioner under the North Carolina Rules of Appellate Procedure for filing a frivolous appeal, where the North Carolina appellate courts have previously dismissed all of Petitioner's subsequent appeals of such sanctions order.

STATEMENT OF THE CASE

This matter is before the Court upon the Petition of *pro se* Petitioner C. Thomas Ross ("Petitioner") for Writ of Certiorari to review the unpublished opinion of the North Carolina Court of Appeals in *Whitaker v. Whitaker*, No. COA06-465, 2007 WL 328807 (N.C. Ct. App. Feb. 6, 2007), *disc. rev. denied*, 646 S.E.2d 774 (N.C. 2007) ("*Whitaker III*"), in which sanctions were imposed against Petitioner pursuant to Rule 34 of the North Carolina Rules of Appellate Procedure for filing a frivolous appeal.

Petitioner is a former attorney of record for the original named Plaintiff in this action, Louisa B. Whitaker ("Ms. Whitaker").[1] The actual lawsuit underlying this Petition is a dispute of Ms. Whitaker with her three siblings over their mother's estate. The intra-family litigation has been ongoing in the North Carolina courts for nearly a decade and has given rise to nine appeals, attempted appeals, or appellate petitions in this and related litigation, and has so far resulted in three written opinions by the North Carolina Court of Appeals, culminating in

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[1] Although Petitioner has taken the liberty of recaptioning the case to insert himself as a named party to this action, since 2002, this case has been docketed as *Louisa B. Whitaker v. John C. Whitaker, Jr., Elizabeth N. Whitaker, II, and William A. Whitaker*. Petitioner has never been a party to this action. Rather, he is one of several attorneys who have represented Ms. Whitaker at various times during the course of this state court civil action.

Whitaker III. The Supreme Court of North Carolina, however, has consistently declined to hear any aspect of this litigation. The present Petition is the final unpleasant chapter in the long and tortured saga of this case.

In *Whitaker III*, which was an unpublished opinion without controlling precedential value, the North Carolina Court of Appeals once again ruled in favor of Respondents and additionally imposed sanctions jointly against Petitioner and Ms. Whitaker for filing a frivolous appeal in violation of Rule 34(a) of the North Carolina Rules of Appellate Procedure. The North Carolina Court of Appeals remanded *Whitaker III* to the trial court for a determination of the amount of reasonable attorneys' fees to be imposed as sanctions.

On March 8, 2007, Ms. Whitaker timely petitioned the Supreme Court of North Carolina for discretionary review of *Whitaker III*, asserting constitutional challenges to the sanctions order similar to those raised in the present Petition. Ms. Whitaker's Petition for Discretionary Review was denied by the Supreme Court of North Carolina on May 9, 2007.

However, unlike his former client, Petitioner did *not* timely petition the North Carolina Court of Appeals for rehearing of *Whitaker III*, and did *not* timely file notice of appeal or petition for discretionary review of *Whitaker III* with the Supreme Court of North Carolina.

Instead, Petitioner improperly waited for the matter to be remanded to the trial court for determination of the amount of attorneys' fees to be awarded as sanctions, and then began his belated attack on *Whitaker III* only after Ms. Whitaker, his former client, refused to pay the entire amount of the $15,992.50 in attorneys' fees that were jointly assessed as sanctions.[2]

On July 23, 2007, more than three months after the deadline for appealing *Whitaker III* had expired, Petitioner improperly filed Notice of Appeal with the North Carolina Court of Appeals, remarkably asking that Court to overrule its own opinion in *Whitaker III* on the same purported constitutional grounds that form the basis of the present Petition. Not surprisingly, on February 6, 2008, the North Carolina Court of Appeals summarily dismissed Petitioner's appeal.

On February 21, 2008, Petitioner filed Notice of Appeal and Petition for Discretionary Review with the Supreme Court of North Carolina, once again belatedly attempting to challenge *Whitaker III* on the same purported constitutional grounds that form the basis of the present Petition. On April 10, 2008, the Supreme Court of North Carolina summarily dismissed Petitioner's appeal and declined to allow discretionary review.

---

[2] Ms. Whitaker subsequently paid over half of the attorneys' fees at issue, leaving less than $8,000 actually at issue in this Petition.

On July 9, 2008, having had all of his prior appeals dismissed by every appellate court in North Carolina, Petitioner filed the present petition, asking this Court to consider the constitutionality of sanctions that were imposed against Petitioner by the North Carolina Court of Appeals for procedural rules violations almost a year-and-a-half earlier in *Whitaker III*.

REASONS FOR DENYING THE PETITION

Petitioner has presented no compelling reason for the Court to grant Writ of Certiorari to review the February 6, 2007 unpublished opinion of the North Carolina Court of Appeals in *Whitaker III*, in which Petitioner and his former client were sanctioned for filing a frivolous appeal. The Petition does not raise any important questions of federal law. Rather, it is an attempted appeal from a procedural matter under state law that represents nothing more than a last-ditch effort by Petitioner to avoid modest sanctions that were properly imposed against him by the North Carolina Court of Appeals for filing a frivolous appeal.

Very simply, Petitioner originally violated the North Carolina Rules of Appellate Procedure by filing a frivolous appeal. He subsequently violated those same rules by failing to timely perfect his appeal of the sanctions order, resulting in back-to-back dismissals of his appeal at each level of the North

Carolina appellate courts. Repeated violations of state court procedural rules do not entitle a litigant to review in this Court. Accordingly, Respondents respectfully request that the United States Supreme Court deny the Petition for Writ of Certiorari.

This the 5th day of August, 2008.

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